

## Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea

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In 1971, when the negotiations leading to the development of a new treaty on the law of the sea were in their earliest stages, the head of the U.S. delegation, John R. Stevenson, declared that freedom of passage through international straits was an essential element of any agreement that would be acceptable to the United States.<sup>1</sup> Despite occasional criticism that this characterization of the position is overstated,<sup>2</sup> it has remained a cornerstone of the U.S. negotiating position in the Seabed Committee and the Third United Nations Conference on the Law of the Sea (UNCLOS III or the Conference).

Now that the Conference appears to have come to a consensus on a set of articles governing international straits,<sup>3</sup> as well as ap-

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1. Stevenson, *U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee*, 65 DEP'T STATE BULL. 261, 263-64 (1971) (statement made in Subcommittee II of the U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction).

2. Some commentators have suggested that the government's concern about the possible threat to national security may be exaggerated. They argue that territorial expansion of coastal States and the maintenance of innocent passage would not necessarily compromise the defense of the United States, because the United States has improved the range and sophistication of its submarines and the Soviet Union would not be advantaged by the maintenance of the current regime. See Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373 (1978); Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage through International Straits*, 51 ORE. L. REV. 759, 775-81 (1972); Osgood, *U.S. Security Interests in Ocean Law*, 2 OCEAN DEV. & INT'L L. 2, 11-24 (1974); Pirtle, *Transit Rights and U.S. Security Interests in International Straits: the "Straits Debate" Revisited*, 5 OCEAN DEV. & INT'L L. 477, 487-94 (1978). The merits of the established U.S. position on the importance of freedom of passage, however, are taken as a given for the purposes of this article.

3. Since many States have indicated that they regard a comprehensive law of the sea treaty as a "package deal," no issue can be considered finally settled until agreement is reached on all issues. Nevertheless, some parts of the package have reached such a state of acceptance by the membership of the Conference that it seems safe to believe that they will be a part of the final convention that will be adopted by the Conference. Among these are the articles dealing with the territorial sea, straits used for international navigation, and archipelagic States. See Oxman, *The Third United Nations Conference on the Law of the*

parent agreement on a mirror-image set of articles governing archipelagic waters, it is an appropriate time to examine these articles of the Draft Convention on the Law of the Sea (Draft Convention)<sup>4</sup> of UNCLOS III to determine if the values stated to be essential to the United States are protected. This article makes such an examination, and concludes that U.S. goals generally are realized. This conclusion is based on an analysis of U.S. goals in light of existing international law, the history of the articles' formulation, and their present substance.

### I. THE U.S. POSITION: BACKGROUND AND SUBSTANCE OF THE PRESENT STRAITS REGIME

The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (Territorial Sea Convention) provides that ships of all States have the right of "innocent passage" through the territorial sea of all other States.<sup>5</sup> It also provides that "there shall be no

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*Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1, 6-8 (1979). See also text at notes 138-42 *infra*. The tenth session of the Conference is scheduled to convene in New York in March 1981. It is likely that the Convention will be adopted before the end of 1981. At the seventh session, the Conference adopted a stringent rule regarding amendment of the Informal Composite Negotiating Text (ICNT), requiring generally that any amendment should emerge from the negotiations and not from the proposal of a single member. Organization of work: Decisions taken by the Conference at its 90th meeting on the report of the General Committee, 10 UNCLOS III Off. Rec. 8, para. II(10), U.N. Doc. A/CONF.62/62 (1978).

4. Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF.62/WP.10/Rev.3 (1980) [hereinafter cited as Draft Convention]. Articles 34-45 concern international straits and appear as an appendix hereto. Articles 46-54 concern archipelagic waters. The first ICNT was promulgated at the close of the sixth session of the Conference held in New York, May 23-July 15, 1977. 8 UNCLOS III Off. Rec. 1, U.N. Doc. A/CONF.62/WP.10 (1977). A first revision was promulgated during the first part of the eighth session held in Geneva, March 19-April 27, 1979. U.N. Doc. A/CONF.62/WP.10/Rev.1 (1979), reprinted in 18 INT'L LEGAL MATERIALS 686 (1979). A second revision was promulgated at the end of the first part of the ninth session held in New York, March 3-April 4, 1980. U.N. Doc. A/CONF.62/WP.10/Rev.2 (1980). A third revision was promulgated as the Draft Convention on the Law of the Sea (Informal Text) at the end of the ninth session on August 27, 1980. U.N. Doc. A/CONF.62/WP.10/Rev.3 (1980). The straits articles of the four texts are substantially identical.

5. Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, art. 14, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter cited as Territorial Sea Convention]. Article 14 provides:

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.”<sup>6</sup> For a major maritime and naval power like the United States, the 1958 formulation of the concept of innocent passage, when applied to straits which link important bodies of the oceans, poses three problems. First, the definition of “innocent” passage is, in the view of some, dependent upon the purpose, destination, or cargo of the voyage, as well as upon acts committed in the course of the passage.<sup>7</sup> Thus, determination of whether passage is innocent is arguably within the subjective judgment of the bordering State.<sup>8</sup> Second, the Territorial Sea Convention requires sub-

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3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

*Id.*

6. *Id.* art. 16, para. 4.

7. See, e.g., M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 258 (1962); Grandison & Meyer, *International Straits, Global Communications, and the Evolving Law of the Sea*, 8 VAND. J. TRANSNAT'L L. 393, 401-02 (1975); Sorenson, *The Law of the Sea*, [1958] INT'L CONCILIATION 195, 234.

8. Ironically, it was an amendment proposed by the United States at the 1958 Conference that gave rise to this argument. At that conference, the articles on the law of the sea adopted by the International Law Commission at its eighth session served as the negotiating text. Article 15, para. 3 of those articles provided that “[p]assage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law.” Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) 6, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N. 253, 258 (emphasis added) [hereinafter cited as ILC Text]. The U.S. proposal would have amended the paragraph to read: “Passage is innocent so long as it is not prejudicial to the security of the coastal State or contrary to the present rules.” 3 UNCLOS Off. Rec. 216, U.N. Doc. A/CONF.13/C.1/L.28 (1958). The proposed amendment was accompanied by a “Comment” which gave as the reason for the amendment that “[t]he phrase in paragraph 3 of draft article 15 that ‘ . . . the ship does not use the territorial sea for committing any acts . . . ’ is considered to be ambiguous.” *Id.* Ambassador Arthur Dean, the head of the U.S. delegation to the 1958 Conference, explained to the First Committee of the Conference that the United States proposed “the substitution of the words ‘it is not’ for the words ‘a ship does not use the territorial sea for committing any acts’ because it favored a more general formulation, and did not believe it was necessary to mention the kind of acts that rendered passage no longer innocent. The right of innocent passage was so important that the provi-

marines to navigate on the surface.<sup>9</sup> Third, aircraft are not afforded the right of innocent passage.<sup>10</sup>

Some of these would not be problems if a three-mile-territorial-sea regime still existed. Freedom of navigation had been protected by the narrowness of the territorial belt, leaving, in most important straits, a ribbon of high seas not subject to territorial claim.<sup>11</sup> Thus, the efforts of the maritime States in 1958 were directed principally toward preserving the concept of the three-mile territorial sea.<sup>12</sup> However, when more and more States extended their territorial seas to twelve miles and beyond, rules which were acceptable for a three-mile territorial sea came into question. Moreover, if the claims to archipelagic waters by States such as Indonesia and the Philippines were to gain acceptance,<sup>13</sup> then still other ocean passages would become "territorial."

Nonetheless, it seems doubtful that these dissatisfactions with

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sion should be as unambiguous as possible; that was the aim of his amendment." First Committee, Twenty-fourth Meeting, Summary Records, 3 UNCLOS Off. Rec. 76, U.N. Doc. A/CONF.13/39 (1958) (summarizing statement made by Dean). Dean's statement has been characterized as "astonishing." M. McDUGAL & W. BURKE, *supra* note 7, at 258 n.220.

9. Territorial Sea Convention, *supra* note 5, art. 14, para. 6.

10. There is no explicit provision in any of the conventions generally governing the oceans that specifically abrogates the right of passage for aircraft. Although conventions governing aircraft have granted innocent passage to *signatories*, see, e.g., Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 174, there is no generally accepted principle of international law providing for such a right of passage for aircraft over territorial seas. The complete and exclusive sovereignty of a State over its airspace, however, is generally accepted as a principle of international law. Pepin, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session*, 1 UNCLOS Off. Rec. 64, 66-67, U.N. Doc. A/CONF.13/4 (1958).

11. The Strait of Dover, for example, is 17 nautical miles wide at its narrowest point; Gibraltar is 7-½ nautical miles wide at its narrowest point. Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic*, 1 UNCLOS Off. Rec. 114-15, 134, U.N. Doc. A/CONF.13/6/Add.1 (1958).

12. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 63 (1978).

13. According to the claims of Indonesia and the Philippines, each nation "would draw a perimeter around their outermost island, to the east, west, north and south; and then all the waters lying within that perimeter are claimed as historic internal waters . . ." Dean, *The Second Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 765 (1960). Within these enormous areas, "there would be no right of innocent passage except subject to unilateral control, no right of submerged navigation and no right of aircraft overflight in the absence of treaty provisions." *Id.* at 766. Despite a lack of serious consideration at the 1958 and 1960 conferences, Indonesia and the Philippines continued to assert and advocate their claims in the 1960's. See Brock, *Archipelago Concept of Limits of Territorial Seas*, NAVAL WAR C. REV., Dec. 1966, at 34. Although the development of the archipelago concept in UNCLOS III is related to the straits issue, a direct discussion of that concept is beyond the scope of this article.

the existing regime, standing alone, would have caused the United States or one of the other major maritime States to take the initiative to correct them by means of a new law of the sea conference. Although there were other areas of untidiness left over from the 1958 and 1960 conferences—the most significant of which were the lack of agreement on the breadth of the territorial sea,<sup>14</sup> the open-ended definition of the continental shelf,<sup>15</sup> and the nature and extent of preferential rights of coastal States in the living resources beyond the territorial sea<sup>16</sup>—the risks of such a conference were great. The major maritime States feared that reopening the issues would generate unexpected proposals and result in the loss of an imperfect but bearable regime. In the end, it was Ambassador Pardo's famous call for action on the seabeds in the 1967 General Assembly<sup>17</sup> that began the movement which led eventually to a General Assembly resolution calling for UNCLOS III.<sup>18</sup>

The initial concern of Ambassador Pardo, and of the U.N. General Assembly following his call to action, was with the deep seabed beyond the limits of national jurisdiction. By 1969, however, it became apparent that the seabed and ocean floor could not be treated in isolation. Discussion of the seabed beyond the limits of national jurisdiction inevitably raised questions of the boundaries of national jurisdiction, of the impact of seabed activities on navigation, scientific research and other competing uses of the oceans,

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14. The draft text proposed by the International Law Commission stated that the Commission recognized that there was no uniform international practice as to the breadth of the territorial sea and that international law did not permit an extension beyond 12 miles. The text proposed that the breadth should be fixed by an international conference. ILC Text, *supra* note 8, art. 3. Both the 1958 and 1960 Conferences were unable to fix a breadth. See Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 613-14 (1958); Dean, *supra* note 13, at 772-82.

15. Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as the Continental Shelf Convention].

16. Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, arts. 1, 6, 7, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

17. Ambassador Pardo of Malta sent a *note verbale* to the Secretary General proposing an agenda item for the 22d Session of the General Assembly entitled "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." 22 U.N. GAOR, 3 Annexes (Agenda Item 92) 1, U.N. Doc. A/6695 (1967). Ambassador Pardo amplified his proposal in a statement in the First Committee on Nov. 1, 1967. 22 U.N. GAOR, C.1 (1515th-1516th mtgs.), U.N. Doc. A/C.1/PV.1515-16 (1967).

18. G.A. Res. 2750C, 25 U.N. GAOR, Supp. (No. 28) 26, U.N. Doc. A/8028 (1971).

and of the protection of the ocean environment.<sup>19</sup> On December 15, 1969, the U.N. General Assembly authorized the Secretary General to query member States on the desirability of convening a conference on the law of the sea.<sup>20</sup>

It was against this background that President Nixon made his dramatic oceans-policy statement of May 23, 1970.<sup>21</sup> The President called for a new treaty on the seabeds, and also declared:

It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law of the sea treaty. *This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits.*<sup>22</sup>

The new U.S. oceans policy had been outlined a few months earlier by the Legal Adviser to the State Department, John R. Stevenson. With respect to the breadth of the territorial sea and international straits, he stated:

As a result of our consultations we believe the time is right for the conclusion of a new international treaty fixing the limitation of the territorial sea at 12 miles and providing for freedom of transit through and over international straits and carefully defined preferential fishing rights for coastal states on the high seas. We intend to work closely with the many other nations who share our views in these matters at the U.N. this fall as a matter of high priority.<sup>23</sup>

The United States made its proposals<sup>24</sup> at the 1971 summer ses-

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19. See 23 U.N. GAOR, C.1 (1588th-1605th mtgs.), U.N. Doc. A/C.1/PV.1588-1605 (1968).

20. G.A. Res. 2574, 24 U.N. GAOR, Supp. (No. 30) 9, U.N. Doc. A/7630 (1969).

21. President's Statement on United States Ocean Policy, 6 WEEKLY COMP. OF PRES. DOC. 677, 678 (May 25, 1970).

22. *Id.* at 678 (emphasis added).

23. Stevenson, *International Law and the Oceans*, 62 DEP'T STATE BULL. 339, 341 (1970).

24. The U.S. proposal for a comprehensive regime of the seabed had been introduced a year earlier. Draft United Nations Convention on the International Sea-Bed Area, Working Paper Submitted by the United States of America, 25 U.N. GAOR, Supp. (No. 21) 130, U.N. Doc. A/8021/Annex V (1970), reprinted in 9 INT'L LEGAL MATERIALS 1046 (1970). For a summary of the draft convention and statements made before the Seabed Committee by Stevenson and U.S. Representative Christopher H. Phillips, see 63 DEP'T STATE BULL. 209 (1970).

sion of the U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction (Seabed Committee)<sup>25</sup> at which Stevenson, at that time the U.S. representative to the Seabed Committee, introduced draft articles<sup>26</sup> on the breadth of the territorial sea, passage through straits, and fisheries.<sup>27</sup> Article I provided that each State should have the right to establish the breadth of its territorial sea at a maximum of twelve miles, and, if it chose to accept a lesser breadth, should have the right to a contiguous exclusive fisheries zone in the remaining portion of the twelve-mile zone.<sup>28</sup> Article II, the straits article, provided as follows:

1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of naviga-

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25. The Seabed Committee, see G.A. Res. 2467A, 23 U.N. GAOR, Supp. (No. 18) 15, U.N. Doc. A/7218 (1968), reprinted in 8 INT'L LEGAL MATERIALS 201 (1969), was the successor to the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, which had been established by the U.N. General Assembly after Ambassador Pardo's call for action. See G.A. Res. 2340, 22 U.N. GAOR, Supp. (No. 16) 14, U.N. Doc. A/6716 (1967), reprinted in 7 INT'L LEGAL MATERIALS 174 (1968). In 1970, the Seabed Committee was charged by the General Assembly with the preparation of a list of subjects and issues and draft treaty articles for a law of the sea conference. G.A. Res. 2750C, U.N. GAOR, Supp. (No. 28) 26, U.N. Doc. A/C.1/PV.1515-16 (1967).

26. Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted to Sub-Committee II by the United States of America, 26 U.N. GAOR, Supp. (No. 21) 241, U.N. Doc. A/8421/Annex IV (1971), reprinted in 65 DEP'T STATE BULL. 261, 266 (1971) [hereinafter cited as U.S. 1971 Draft Articles].

27. Article III set forth in detail regulations regarding preferential rights of coastal States and others in the fisheries and other living resources of the high seas beyond the 12-mile combined territorial sea-fisheries zone. The fisheries article was part of a quid pro quo—it was necessary to gain acceptance within the U.S. government of the 12-mile territorial sea proposed in article I, and would, it was hoped, persuade coastal-fishing States to accept a 12-mile territorial sea rather than claim a broader territorial sea solely for the purpose of protecting fishing rights. See Hollick, *The Law of the Sea and U.S. Policy Initiatives*, 15 ORBIS 670, 672 (1971); Hollick, *Seabeds Make Strange Politics*, FOREIGN POL'Y, Wint. 1972-1973, at 162. The Hollick articles provide insight into the bureaucratic politics behind the development of the U.S. law of the sea positions.

The fisheries issue is important here only insofar as its resolution affects the resolution of the territorial sea, straits, and related navigation issues. In the early stages of the development of the U.S. position, U.S. officials apparently felt that the seabed proposals and the proposals on the territorial sea, straits, and fisheries could stand as two independent packages, with tradeoffs confined internally to each. However, as the negotiations (both intragovernmental and international) proceeded, the two packages gradually merged into one. See Hollick, *The Law of the Sea and U.S. Policy Initiatives*, *supra*, at 676; Hollick, *Seabeds Make Strange Politics*, *supra*, at 164.

28. U.S. 1971 Draft Articles, *supra* note 26, art. I.

tion and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.

2. The provisions of this Article shall not affect conventions or other international agreements already in force specifically relating to particular straits.<sup>29</sup>

These two articles were part of an indivisible package; the twelve-mile territorial sea was acceptable only if a treaty could be negotiated which would provide for freedom of navigation through and over international straits.<sup>30</sup>

In a statement delivered in Subcommittee II<sup>31</sup> of the Seabed Committee on August 3, 1971, Ambassador Stevenson explained his proposals in considerable detail.<sup>32</sup> A careful analysis of the Ambassador's explanation indicates which parts of the package were considered indispensable elements of any treaty acceptable to the United States, and which were subject to negotiation and modification. This is the first step in determining whether the results of the negotiations, as reflected in the current negotiating text, preserve points originally considered essential by the United States.

The Stevenson statement indicated the continuing commitment of the United States to a narrow territorial sea. While the U.S. preference for a three-mile limit was reiterated, Stevenson declared that the United States "is prepared to take into account the views of others and to agree to a treaty fixing the maximum breadth of the territorial sea at 12 nautical miles, if there is an adequate agreement concerning international straits . . . ."<sup>33</sup> Thus, an "adequate agreement" for straits was the key. As spelled out by Stevenson, an "adequate agreement" required an absolute

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29. *Id.* art. II.

30. See Stevenson, *supra* note 23, at 341; Stevenson, *supra* note 1, at 262.

31. For a summary of the work of the subcommittee see Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 26 U.N. GAOR, Supp. (No. 21) 30, U.N. Doc. A/8421 (1971) [hereinafter cited as Report on the Work of the Seabed Committee in 1971].

32. Stevenson, *supra* note 1, at 262-66.

33. *Id.* at 262.



right of passage through "international" straits as defined in the Territorial Sea Convention;<sup>34</sup> that is, those straits joining two parts of the high seas or the high seas with the territorial sea of another State.<sup>35</sup> The restrictive nature of "innocent passage"<sup>36</sup> and the possibility of its subjective interpretation by the riparian State in a way that would make innocence depend on cargo, flag, or destination<sup>37</sup> created major impediments to the mobility of naval forces and the free passage of commercial vessels and aircraft. Although Stevenson referred to free passage through straits as "an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves,"<sup>38</sup> and draft article II stated that ships and aircraft in transit "shall enjoy the same freedom of navigation and overflight . . . as they have on the high seas,"<sup>39</sup> it seems clear that even at the outset the U.S. proposal did not envisage complete high-seas freedom for ships and aircraft in passage. This is evident from the provision of article II itself that riparian States might prescribe corridors suitable for transit by all ships and aircraft<sup>40</sup> and from Stevenson's recognition of the special concern of bordering States for protection against pollution from ships in transit.<sup>41</sup>

The United States apparently recognized the right of a coastal State to prescribe and enforce other types of regulation as well, for Stevenson stated at one point:

[T]he right is a narrow one—merely one of transiting the straits, not of conducting any other activities. Should a vessel conduct any other activities *that are in violation of coastal state laws and regulations*, it would be exceeding the scope of its right and would be *subject to appropriate enforcement action* by the coastal state.<sup>42</sup>

Stevenson cautioned, however, that the scope of the riparian State's authority to enforce national laws and regulations had to be approached with caution, since even safety regulations could be

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34. *Id.* at 263.

35. Territorial Sea Convention, *supra* note 5, art. 16, para. 4.

36. *See* notes 7 & 8 *supra* & accompanying text.

37. *See* notes 7 & 8 *supra* & accompanying text.

38. Stevenson, *supra* note 1, at 262.

39. U.S. 1971 Draft Articles, *supra* note 26, art. II, para. 1.

40. *Id.*

41. Stevenson, *supra* note 1, at 263.

42. *Id.* (emphasis added).

used as a means "of impairing the right of free transit."<sup>43</sup>

Stevenson made it clear that paragraph 2 of article II excluded straits already covered by international agreements,<sup>44</sup> such as the Montreux Convention on the Turkish straits.<sup>45</sup> But Stevenson was not so explicit concerning straits less than six miles wide, which presumably now are governed by the regime of innocent passage. It could be argued<sup>46</sup> that the effect of the U.S. articles would be to create two separate regimes—innocent passage for straits less than six miles wide and freedom of passage for straits from six to twenty-four miles wide. The wording of article II, however, by referring to only one category of straits, belies this interpretation. Stevenson stated that the article provided for a right of free transit "through and over *all* international straits overlapped by territorial seas."<sup>47</sup> At a later point he stated:

[T]he United States believes that straits wider than 6 miles currently have high seas within them where states may exercise the freedoms of the high seas. In short, the present rule of international law in virtually all of the straits of concern is freedom of the seas. To achieve widespread international agreement, we are prepared to give up high seas freedoms in these international straits in exchange for a limited but vital right. Subject only to the right of free transit, territorial waters in international straits would retain their national character in each and every respect.<sup>48</sup>

The United States apparently was proposing a package in which it would accept the claim of coastal States to a twelve-mile territorial sea in return for the right of free transit (limited only as described) through *all* straits.<sup>49</sup> States bordering straits would give up their

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43. *Id.*

44. *Id.*

45. Convention Regarding the Regime of the Straits, July 20, 1936, 173 L.N.T.S. 215.

46. See, e.g., Milic, *Third United Nations Conference on the Law of the Sea*, 8 CASE W. RES. J. INT'L L. 168, 180-81 (1976). Milic suggests that the major maritime powers had asked for the continuation of the freedom of navigation only for straits between 6 and 24 miles wide. *Id.* at 180.

47. Stevenson, *supra* note 1, at 263 (emphasis added).

48. *Id.*

49. It has been argued that the United States and other maritime States still adhering to the three-mile limit are not sacrificing much, since by the time of the U.S. proposal, adherents of the three-mile territorial sea were clearly in the minority. The United States itself arguably had a de facto 12-mile limit. See Knight, *supra* note 2, at 766-67.

right to enforce innocent-passage rules in straits not exceeding six miles in width in return for the establishment of an international law norm of a twelve-mile territorial sea and the right to apply a new regime for international straits twenty-four miles or less in width. Thus, the suggestion that the regime described is to apply only to straits more than six miles wide appears to be completely inconsistent with the emphasis placed by the United States on the infirmities of the regime of innocent passage and the importance of free communication through international straits.

One additional aspect of the "coverage" of the proposed U.S. straits article deserves consideration. The definition of international straits as those "used for international navigation" and joining "one part of the high seas and another part of the high seas or the territorial sea of a foreign State"<sup>50</sup> is based on the formulation found in article 16(4) of the Territorial Sea Convention.<sup>51</sup> Because of the charge that the phrase "or the territorial sea of a foreign state" was added to article 16(4) to promote the claims of Israel to navigation in the Gulf of Aqaba and through the Strait of Tiran,<sup>52</sup>

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50. U.S. 1971 Draft Articles, *supra* note 26, art. II, para. 1.

51. Territorial Sea Convention, *supra* note 5, art. 16, para. 4. The phrase "or the territorial sea of a foreign State" was not a part of the International Law Commission's initial draft article for the 1958 Convention but was added instead by amendment in the First Committee. The amendment passed by the narrow margin of 31 for, 30 against, and 10 abstentions, with all the Islamic States and the Soviet bloc voting against it. First Committee, Thirty-fourth Meeting, Summary Records, 3 UNCLOS Off. Rec. 100, U.N. Doc. A/CONF.13/39 (1958). The original amendment, which was sponsored by the Netherlands, Portugal, and the United Kingdom, referred to "territorial waters" rather than the "territorial sea." 3 UNCLOS Off. Rec. 231, U.N. Doc. A/CONF.13/C.1/L.71 (1958). The United States originally had submitted an amendment to paragraph 4 that addressed the *prohibition* of innocent passage, rather than the "suspension" of innocent passage, as the Netherlands-Portugal-United Kingdom proposal provided, but the proposal was limited to straits joining two parts of the high seas. 3 UNCLOS Off. Rec. 220, U.N. Doc. A/CONF.13/C.1/L.39 (1958). The United States, however, eventually withdrew its version of the amendment in favor of the Netherlands-Portugal-United Kingdom proposal. First Committee, Thirty-second Meeting, Summary Records, 3 UNCLOS Off. Rec. 93, U.N. Doc. A/CONF.13/39 (1958). In plenary session, Saudi Arabia's request for a separate vote on paragraph 4 of article 17 was defeated, and the article as a whole was approved by a vote of 62 for, 1 against, and 9 abstentions. Twentieth Plenary Meeting, Summary Records, 2 UNCLOS Off. Rec. 65, U.N. Doc. A/CONF.13/38 (1958).

52. According to Ambassador Shukari, "the amended text no longer dealt with general principles of international law, but had been carefully tailored to promote the claims of one State." First Committee, Thirty-third Meeting, Summary Records, 3 UNCLOS Off. Rec. 96, U.N. Doc. A/CONF.13/C.1/L.39 (1958). *See also* Dean, *supra* note 14, at 623 ("[T]he Conference . . . adopted a rule which clearly applied to the Israeli-Arab controversy.").

At the 14th meeting of the Second Committee of UNCLOS III, the representative of Kuwait, speaking on behalf of Iraq, the United Arab Emirates, the Libyan Arab Republic,

no Arab State except Tunisia has signed the Territorial Sea Convention.<sup>53</sup> Since Stevenson did not emphasize this part of the definition in his statement to the Seabed Committee, its importance to the United States was not indicated. It would appear from later events, however, that this was a negotiable point. Perhaps the United States recognized that a multilateral agreement on the law of the sea was not an appropriate vehicle by which to settle what was in essence a regional dispute.

In summary, although the U.S. straits proposal was drafted in terms which would have granted the "same freedom of navigation and overflight" as existed on the high seas, the regime actually envisaged something less than high-seas freedoms. Nevertheless, it was considerably more than "innocent passage" as codified in 1958 and interpreted in the practice of States since that time. As a minimum it seemed to embrace the following elements:

- Passage could not be interrupted or impeded.
- The right of passage could not be dependent upon the destination, flag, type of vessel (public or private, warship or commercial), or cargo.
- The right of passage included the right of overflight by aircraft and submerged passage by submarines.
- The right of passage applied to all international straits used for international navigation between parts of the high seas; although the definition included straits leading only to the territorial sea of another State, this aspect of the definition was not emphasized.
- The right of passage included only those activities incident to passage.
- Ships, and presumably aircraft, in passage could be subjected to reasonable coastal State regulations, such as pollution controls, traffic separation schemes, and other regulations which were more than a disguised means of denying passage.

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Saudi Arabia, Qatar, and Kuwait, confirmed that the governments on whose behalf he was speaking had not acceded to the Territorial Sea Convention because that provision "had been politically motivated by the desire to accommodate specific interests in a particular region." Second Committee, Fourteenth Meeting, Summary Records, 2 UNCLOS III Off. Rec. 139, U.N. Doc. A/CONF.62/C.2/SR.14 (1974).

53. Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc. as at 31 December 1979, 565-66, U.N. Doc. ST/LEG/D/13 (1980).

## II. EVOLUTION OF THE CURRENT LAW OF THE SEA ARTICLE PERTAINING TO STRAITS

This section details the evolution of the current draft articles. Such a chronology is essential to an understanding of the Draft Convention.

### A. *The 1971-1972 Sessions of the Seabed Committee*

The initial reaction to the U.S. straits and territorial sea proposal was mixed. Several States expressed the view that the concept of innocent passage as codified in 1958 expressed the appropriate balance between coastal and maritime interests and saw no need to tamper with the existing articles.<sup>54</sup> A few believed that some liberalization of the innocent-passage concept was needed, but did not wish to abandon the concept entirely.<sup>55</sup> Several States expressed particular concern about the need for pollution control measures in light of the enhanced danger of major oil spills posed by super-tankers.<sup>56</sup> Several pointed out that straits were *sui generis* and that mere tinkering with the doctrine of innocent passage would not be sufficient.<sup>57</sup> Others opposed the U.S. proposal outright, at least insofar as it included freedom of passage for warships.<sup>58</sup>

These concerns<sup>59</sup> prompted Ambassador Stevenson to make another major statement clarifying and explaining the limits of the

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54. See, e.g., Statement of Mr. Fergo (Denmark), Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee II, Summary Records 35, U.N. Doc. A/AC.138/SC.II/SR.4-23 (1971) [hereinafter Sub-Committee II Summary Records]; statement of Mr. Tranos (Greece), *id.* at 115-16; statement of Mr. D'Andrea (Italy), *id.* at 159-60. Mr. D'Andrea also expressed the view that the subject of overflight was beyond the mandate of Sub-Committee II. *Id.* at 160.

55. See, e.g., statement of Mr. Wolde-Giorgis (Ethiopia), *id.* at 90.

56. See, e.g., statement of Mr. Ruiz-Morales (Spain), Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee III, Summary Records 21, U.N. Doc. A/AC.138/SC.III/SR.3-14 (1971); statement of Mr. Vohrah (Malaysia), Sub-Committee II Summary Records, *supra* note 54, at 88; statement of Mr. Djalal (Indonesia), *id.* at 113.

57. See, e.g., statement of Mr. Brazil (Australia), Sub-Committee II Summary Records, *supra* note 54, at 155-56; statement of Mr. Zafera (Madagascar), *id.* at 73.

58. See, e.g., statement of Mr. Kusumaatmadja (Indonesia), Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee I, Summary Records 200, U.N. Doc. A/AC.138/SC.I/SR.5-31 (1971); statement of Mr. Vohrah, Sub-Committee II Summary Records, *supra* note 54, at 87-88.

59. For a summary of the general debate in the committee and its subcommittees, see Report on the Work of the Seabed Committee in 1971, *supra* note 31, at 1-50. Since the only other formal proposal on straits was that contained in Malta's all-inclusive ocean and space treaty, see *id.* at 105, debate on straits was limited in scope and general in content.

U.S. proposal in the July-August 1972 session of the Seabed Committee.<sup>60</sup> Stevenson reiterated the assurance given in 1971 that, under the U.S. proposal, the rights of ships and aircraft in transit were not the equivalent of high-seas rights. Ships and aircraft exercising their right of transit could not "navigate unsafely" or "pollute."<sup>61</sup> To ensure that they would not do so, ships and aircraft would be subject to the coastal State's regulatory authority. However, Stevenson added the significant qualification that the regulatory scheme of the coastal State must be consistent with standards established by international bodies—the Inter-Governmental Maritime Consultative Organization (IMCO) in the case of ships, and the International Civil Aviation Organization (ICAO) in the case of aircraft.<sup>62</sup> Once adopted by the coastal State, these international schemes would become binding on the parties to the law of the sea treaty.<sup>63</sup>

Although the U.S. delegation did not introduce amendments to its proposal at that time, it outlined three modifications to meet the concerns expressed. First, the United States suggested that coastal States could establish substitute airplane corridors over adjoining land areas where a route directly over a strait might not be the best for air safety and navigation. Second, in order to deal with the problem of State aircraft, which are not subject to ICAO standards, Stevenson proposed that any LOS treaty should provide that State aircraft would "normally respect ICAO standards, recommended practices and procedures as they applied to civil aircraft over the high seas and, secondly, they should operate with due regard for the safety of navigation of civil aircraft."<sup>64</sup> Third, recognizing that the means of enforcement open to coastal States as to both State aircraft and State vessels are limited because of the doctrine of sovereign immunity, Stevenson proposed that the treaty should provide for strict liability for all vessels exercising the right of free transit (including warships) for accidents caused by deviations from IMCO-established traffic-separation schemes, and for strict liability for State aircraft exercising the right of free

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60. Committee on the Peaceful Uses in the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee II, Summary Records 25-27, U.N. Doc. A/AC.138/SC.II/SR.33-47 (1972) (statement by John R. Stevenson).

61. *Id.* at 25.

62. *Id.*

63. *Id.* at 26-27.

64. *Id.* at 27.

transit for accidents caused by deviations from ICAO standards.<sup>65</sup>

In the 1972 sessions of the Seabed Committee, the work moved from general debate to laying a groundwork for the draft articles. Two principal activities took place: the consideration and adoption of the final list of subjects to be considered by the full Conference and the introduction by the Soviet Union of draft articles on straits. The adoption of a final list of issues and subjects is significant because this list formed the agenda of the Conference.<sup>66</sup> Although the subcommittee charged with this project had a number of proposed lists from the 1971 and 1972 sessions,<sup>67</sup> the proposal on which the final list was based was one submitted by Algeria and fifty-five other States.<sup>68</sup> The Algerian proposal omitted any direct reference to "free transit." Fearing that consideration of "free transit" might be excluded, a number of delegations submitted amendments to the Algerian proposal, either to add "free transit" as an additional subdivision,<sup>69</sup> or to delete subdivisions altogether from the major straits heading.<sup>70</sup>

After "intense consultations,"<sup>71</sup> the Seabed Committee adopted a list that included two subheadings: "innocent passage," and "[o]ther related matters including the question of the right of transit."<sup>72</sup> Thus, although the United States was not successful in

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65. *Id.*

66. See G.A. Res. 2750C, 25 U.N. GAOR, Supp. (No. 28) 27, para. 6, U.N. Doc. A/8028 (1971).

67. The proposals are listed in the Seabed Committee reports. See Report on the Work of the Seabed Committee in 1971, *supra* note 31, at iv-v; Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction v-vi, 27 U.N. GAOR, Supp. (No. 21) 4, U.N. Doc. A/8721 (1972) [hereinafter cited as Report on the Work of the Seabed Committee in 1972].

68. Report on the Work of the Seabed Committee in 1972, *supra* note 67, at 142. The Algerian proposal listed the strait issues as follows:

- 4. Straits
  - 4.1 Straits used for international navigation
  - 4.2 Innocent passage

*Id.* at 143.

69. *Id.* at 149. Poland proposed to add to item 4: "including the question of free transit."

*Id.* at 154.

70. *Id.* at 147 (Malta); *id.* at 150 (Soviet Union).

71. *Id.* at 40.

72. *Id.* at 5. The list, as adopted, read:

- 4. Straits used for international navigation
  - 4.1 Innocent passage
  - 4.2 Other related matters including the question of the right of transit

*Id.* at 5.

obtaining a specific reference to "free" transit in the list, the wording of the second subdivision was sufficiently nonspecific to allow discussion of free transit under the general subject of the "right of transit."<sup>73</sup> The viability of the U.S. proposal was preserved.

The Soviet draft articles on straits closely reflected the U.S. straits position. The Soviet proposal, consisting of one article on ships and one on aircraft,<sup>74</sup> was more specific than the U.S. plan. The articles themselves incorporated some of the details that Ambassador Stevenson had covered only in his explanatory statements. The Soviet proposal differed from the U.S. proposal in only one major substantive area. It limited the definition of straits used for international navigation to include only those that joined two parts of the high seas.<sup>75</sup>

The Soviet Union's proposal made no distinction between warships and commercial vessels.<sup>76</sup> The Soviet Union thus repudiated its previous position, as expressed in its reservation to article 23 of the Territorial Sea Convention, that passage of warships through the territorial sea, including straits, could be made subject to the prior authorization of the coastal State.<sup>77</sup> Although the Soviet support of "free transit" gave weight to the argument by less powerful States that this was an issue of concern principally to the superpowers, Soviet support for the essential elements of the U.S. position—hinted at but not previously formalized<sup>78</sup>—removed at least

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73. The United States added a caveat that its acceptance of the final formulation of item 4 "in no way derogates from our position on free transit" and "it provides an opportunity for a full, frank presentation of our position and we are willing to accept the language on this basis." Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee II, Summary Records 69, U.N. Doc. A/AC.138/SC.II/SR.33-47 (1972) (statement by John R. Stevenson).

74. Report on the Work of the Seabeds Committee in 1972, *supra* note 67, at 162-63. For the Soviet statement explaining the proposal, see Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Summary Records 70-73, U.N. Doc. A/AC.138/SR.78-89 (1972).

75. Report on the Work of the Seabed Committee in 1972, *supra* note 67, at 162.

76. Para. 2(a) of the first article, for example, provides that "warships in transit . . . shall not . . . engage in any exercises or gunfire, use weapons of any kind, launch their aircraft . . . ." *Id.* Para. 2(b) of the second article contains similar prohibitions regarding "military aircraft" in transit. *Id.* at 163.

77. Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, *supra* note 53, at 568.

78. At the 28th meeting of Subcommittee II of the Seabed Committee on March 24, 1972, prior to introduction of the Soviet proposal, the Soviet Representative stated that the U.S. proposal could serve as a basis for resolution of the straits problem. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub-Committee II, Summary Records 45, U.N. Doc. A/AC.138/SC.II/SR.24-32 (1972).



one potentially formidable obstacle.

*B. The 1973 Sessions of the Seabed Committee*

In its fall 1972 session, the General Assembly voted to convene UNCLOS·III in December 1973, following two final preparatory sessions of the Seabed Committee in April-May and July-August 1973.<sup>79</sup> Since these two sessions (the fifth and sixth) were the last chance for members of the Seabed Committee to introduce proposals that might serve as draft texts for the Conference, the two sessions produced a blizzard of proposals.<sup>80</sup> The two most significant proposals dealing with straits were introduced by a group of straits States<sup>81</sup> and by Fiji.<sup>82</sup> Both of these proposals advocated the continuation of the nonsuspendable innocent passage principle of the Territorial Sea Convention, modified in some respects to meet the objections of the maritime states. For example, both proposals attempted to make the innocent passage criteria objective by listing those activities of a transiting ship that would render its passage noninnocent.<sup>83</sup> Both proposals spelled out more specifically than the Territorial Sea Convention the authority of coastal States to apply their regulations to transiting ships and the limitations on that authority.<sup>84</sup> In addition, the straits-States proposal specifically provided that innocence could not be determined by flag, cargo, or destination of the transiting vessel.<sup>85</sup>

The proposals, nevertheless, did not fully meet the objections the United States consistently had expressed to the doctrine of innocent passage. Neither met the problem of overflight by aircraft.

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Soviet spokesmen had made similar but less specific statements on at least two prior occasions. See Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Summary Records 152, U.N. Doc. A/AC.138/SR.45-60 (1971); Sub-Committee II Summary Records, *supra* note 54, at 22-24.

79. G.A. Res. 3029A, 27 U.N. GAOR, Supp. (No. 30) 21-22, U.N. Doc. A/8730 (1973).

80. Approximately 50 proposals were submitted to Sub-Committee II of the Seabed Committee in 1973 as compared to two each in 1971 and 1972. See Report on the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28 U.N. GAOR, Supp. (No. 21), vol. 1 at 40, 61-66, U.N. Doc. A/9021 (1973) [hereinafter cited as Report on the Work of the Seabed Committee in 1973].

81. Proposal by Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain, and Yemen, 3 *id.* at 3 [hereinafter cited as Straits-States proposal].

82. 3 Report on the Work of the Seabed Committee in 1973, *supra* note 80, at 91 [hereinafter cited as Fiji proposal].

83. Straits-States proposal, *supra* note 81, art. 7; Fiji proposal, *supra* note 82, art. 3.

84. Straits-States proposal, *supra* note 81, art. 6; Fiji proposal, *supra* note 82, art. 5.

85. Straits-States proposal, *supra* note 81, art. 4.

Both were more restrictive on the passage of warships, submarines, and vessels with special characteristics<sup>86</sup> than for other categories of ships.<sup>87</sup> For example, the straits-States proposal would have authorized coastal States to make passage of nuclear-powered ships or ships carrying nuclear weapons subject to prior authorization.<sup>88</sup> Because these provisions apparently would not be subject to the nonsuspension-of-passage provisions of the articles, certain ships could be denied passage through straits used for international navigation.<sup>89</sup>

This variety of proposals prevented the Seabed Committee, even after meeting for six sessions over a three-year period, from doing much more than compiling all of the proposals into a single document.<sup>90</sup> Although the Seabed Committee was unable to agree on a draft text for consideration by UNCLOS III,<sup>91</sup> it did reduce the number of variants on the straits issue to a reasonable number. Moreover, some movement from extreme positions on both sides gave hope that a compromise acceptable to both straits States and maritime States might be possible. The proposals by the straits States, though a long way from being acceptable to the United States, represented a considerable movement away from their original positions. Likewise, the explanation by the U.S. delegation of its proposal revealed considerable flexibility and room for possible agreement on the basis of something less than the high-seas freedoms spelled out in the document itself.

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86. *E.g.*, nuclear-powered ships, tankers, and ships carrying inflammable, nuclear, explosive, or pollutive substances.

87. Straits-States proposal, *supra* note 81, arts. 3, 14-18, 21-23; Fiji proposal, *supra* note 82, arts. 6, 12-13.

88. Straits-States proposal, *supra* note 81, art. 15.

89. By making the article dealing with the nonsuspension of passage through straits subject to certain of the rules applicable to warships, it appears that the straits-States proposal would not have allowed coastal States to prohibit entirely the passage of warships. *See id.* art. 5, para. 4. There is, however, no such cross-reference to article 15, which states that a coastal State "may require prior notification to or authorization by its competent authorities for the passage through its territorial sea of foreign nuclear-powered ships or ships carrying nuclear weapons." *Id.* art. 15.

90. Report of Sub-Committee II, Annex II, App. VI, 28 U.N. GAOR, Supp. (No. 21), vol. 4, U.N. Doc. A/9021 (1973).

91. The 1958 U.N. Conference on the Law of the Sea had the International Law Commission draft text as a starting point for its negotiation. The lack of such a text for UNCLOS III is one of the reasons progress has been so slow. *See Stevenson, Lawmaking for the Seas*, 61 A.B.A.J. 185, 188 (1975); Yankov, *The Law of the Sea Conference at the Crossroads*, 18 VA. J. INT'L L. 31, 33 (1977).

C. *The Conference Proceedings Leading to the Draft Articles*

Because the first session of UNCLOS III in December 1973 was devoted exclusively to organizational matters, the first substantive discussions took place at the June-August 1974 Caracas session. The preparatory work done by the Seabed Committee served to sharpen the focus of discussions in the UNCLOS III committees to specific proposals before the Conference.<sup>92</sup> The Second Committee, which had inherited essentially the same subjects and issues assigned to Subcommittee II of the Seabed Committee,<sup>93</sup> held forty-six meetings, most of which were devoted to substantive issues.<sup>94</sup> The representatives of some forty-four States addressed the issue of international straits in the six sessions devoted to that issue.<sup>95</sup> Out of these meetings emerged several proposals which formed the principal basis of the discussions.

*The U.K. Proposal.*<sup>96</sup> The United Kingdom introduced the concept of "transit passage" through straits which are used for international navigation and which join two parts of the high seas.<sup>97</sup> The proposal was an honest attempt by the United Kingdom to find a middle ground between the U.S. and Soviet freedom-of-navigation and over-flight proposals on the one hand, and proposals that merely would have tinkered with the doctrine of innocent passage on the other.<sup>98</sup> The introduction of the new term, "transit passage," had the advantage of avoiding the excess baggage carried by the earlier proposals on both sides.<sup>99</sup> Substantively, the transit-

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92. In the committees some general debate still was required, since not all members of UNCLOS III had been members of the Seabed Committee. After the fifth meeting, general debate in the Second Committee was limited to members that had not been members of the Seabed Committee. Second Committee, Sixth Meeting, Summary Records, 2 UNCLOS III Off. Rec. 114, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975). General debate was concluded in the seventh meeting. Second Committee, Seventh Meeting, Summary Records, 2 UNCLOS III Off. Rec. 120, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975).

93. Organization of the second session of the Conference and allocations of items: report of the General Committee, 3 UNCLOS III Off. Rec. 57, U.N. Doc. A/CONF.62/28 (1975).

94. See Statement of activities of the Conference during its first and second sessions, app. 1, UNCLOS III Off. Rec. 142-44 U.N. Doc. A/CONF.62/L.8/Rev.1 (1975).

95. See *id.* at 143.

96. United Kingdom: draft articles on the territorial sea and straits, 3 UNCLOS III Off. Rec. 183-86, U.N. Doc. A/CONF.62/C.2/L.3 (1975) [hereinafter cited as U.K. proposal].

97. *Id.* ch. III, art. 1.

98. See Second Committee, First Meeting, Summary Records, 2 UNCLOS III Off. Rec. 101, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of Mr. Dudgeon (U.K.)) [hereinafter cited as U.K. Introductory Statement].

99. The "excess baggage" of the U.S. and Soviet free-transit proposals was the inference drawn by some delegations that the granting of the "same freedom of navigation and over-

passage proposal preserved rights deemed important by the United States and the Soviet Union. Structurally, it resembled the Soviet Seabed Committee proposal in that it spelled out in detail the rights and obligations of transiting ships and aircraft as well as of the coastal States. The seven key elements were:

(i) "Transit passage" applied only to straits used for international navigation and which join two parts of the high-seas;<sup>100</sup> other straits were governed by the doctrine of nonsuspendable innocent passage.<sup>101</sup> Straits formed by islands and the mainland were exempted from the right of transit passage if an equally suitable high-seas passage seaward of the island existed.<sup>102</sup> Straits wide enough to have an equally suitable high-seas route through them also were exempted.<sup>103</sup>

(ii) Ships and aircraft in transit passage were required to proceed without delay and not to conduct any activities other than those "incidental to their normal modes of transit."<sup>104</sup> Ships were required to comply with generally accepted international rules for safety at sea and for prevention of pollution.<sup>105</sup> Commercial aircraft were to observe ICAO rules. State aircraft normally were to comply with the same rules and operate with due regard for safety. Both were to monitor appropriate radio frequencies.<sup>106</sup>

(iii) Straits States were empowered to prescribe and enforce sea lanes and traffic separation schemes after approval by the appropriate international authority.<sup>107</sup>

(iv) Straits States were authorized to prescribe and enforce laws giving effect to international regulations for the prevention of pollution.<sup>108</sup>

(v) Straits States were prohibited from hampering transit passage and required to give notice of dangers to navigation and

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flight" as existed on the high seas removed the waters from the territorial sea of the straits States. See, e.g., Second Committee, Fourteenth Meeting, Summary Records, 2 UNCLOS III Off. Rec. 136, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of the representative of Spain in the Second Committee). For the "excess baggage" of the innocent-passage proposals, see notes 7-10 *supra* & accompanying text.

100. U.K. proposal, *supra* note 96, art. 1(3).

101. *Id.* art. 8(1)-(2).

102. *Id.* art. 1(4)b.

103. *Id.* art. 1(4)a.

104. *Id.* art. 2(1)a.

105. *Id.* art. 2(2).

106. *Id.* art. 2(3).

107. *Id.* art. 3.

108. *Id.* art. 4.

overflight.<sup>109</sup>

(vi) Standards were specified regarding what acts would render noninnocent passage through straits governed by the regime of nonsuspendable innocent passage.<sup>110</sup>

(vii) Flag States of public vessels or aircraft were made responsible for any damage caused by noncompliance with straits-State regulations.<sup>111</sup>

*The Denmark-Finland Proposal.*<sup>112</sup> This was an amendment to the U.K. proposal to make the latter applicable only to straits between six and twenty-four miles wide. Straits less than six miles wide would have continued under the regime of the Territorial Sea Convention.

*The Algeria Proposal.*<sup>113</sup> This proposal was intended to govern passage to and from States bordering semi-enclosed seas whose only access to ocean space was through straits connecting two parts of the high seas. It would have established a regime of free transit for merchant ships through such straits and a regime of innocent passage for warships. Although applicable only to so-called semi-enclosed seas such as the Mediterranean, it would have had broad application because such seas form some of the most important maritime highways.

*The Oman Proposal.*<sup>114</sup> This was a slightly modified version of the straits-States proposal introduced in the Seabed Committee in 1973. Although basically an "innocent-passage" proposal, passage of merchant ships was to be "presumed" innocent.<sup>115</sup>

In addition, Fiji reintroduced its proposal of 1973.<sup>116</sup> The Eastern Bloc States introduced what was essentially a carbon copy of

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109. *Id.* art. 6.

110. *Id.* art. 16.

111. *Id.* art. 7(1).

112. Denmark and Finland: amendment to document A/CONF.62/C.2/L.3, 3 UNCLOS III Off. Rec. 191, U.N. Doc. A/CONF.62/C.2/L.15 (1975).

113. Algeria: draft articles on straits used for international navigation: semi-enclosed seas, 3 UNCLOS III Off. Rec. 198-99, U.N. Doc. A/CONF.62/C.2/L.20 (1975).

114. Although referred to as the Oman proposal, the proposal was cosponsored by Malaysia, Morocco, Oman and Yemen. Draft articles on navigation through the territorial sea, including straits used for international navigation, 3 UNCLOS III Off. Rec. 192-95, U.N. Doc. A/CONF.62/C.2/L.16 (1975) [hereinafter cited as Oman proposal].

115. Second Committee, Fourteenth Meeting, Summary Records, 2 UNCLOS III Off. Rec. 135-36, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of Oman representative).

116. Fiji: draft articles relating to passage through the territorial sea, 3 UNCLOS III Off. Rec. 196-98, U.N. Doc. A/CONF.62/C.2/L.19 (1975) [hereinafter cited as Second Fiji proposal].

the Soviet proposal submitted to the Seabed Committee in 1972.<sup>117</sup> The United States declined to introduce its earlier plan and instead chose to support the U.K. proposal.

Three principal positions emerged from the discussions in the Second Committee.<sup>118</sup> The dominant position was support for the U.K. proposal. The second was support for the Eastern Bloc proposal, taken principally by members of that bloc. The third was support for some regime of free passage for merchant ships and either notification or authorization for warships.

The U.K. proposal dominated the discussion for two reasons. First, because it was designed as a compromise, it received the support of the most delegations. Second, even those delegations which did not support it outright recognized the trend in its favor. These delegations commented on it, either to suggest how it might be made acceptable to them or to indicate why it was not acceptable.<sup>119</sup> Even the Soviet representative, who gave his formal support to the Eastern Bloc proposal used the term "transit passage" in describing his own proposal.<sup>120</sup> The U.S. spokesman gave unqualified support to the U.K. articles, although he did not use the phrase "transit passage," but referred instead to "unimpeded transit."<sup>121</sup>

In terms of numbers, the Eastern Bloc proposal received considerable support. However, this support came either from members of that bloc or from States that indicated that they equally well could have supported the U.K. proposal.<sup>122</sup>

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117. Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics: draft articles on straits used for international navigation, 3 UNCLOS III Off. Rec. 189-90, U.N. Doc. A/CONF.62/C.2/L.11 (1975) [hereinafter cited as Eastern bloc proposal].

118. After its second session, the Conference adopted procedures under which the substantive discussions took place in working groups and other informal meetings. Since none of these later discussions are documented in a way that reveals the position of individual States, the second session is the only session for which the records reveal how consensus on the successive informal negotiating texts developed.

119. See, e.g., Second Committee, Thirteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 130, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of the representative of Italy); Second Committee, Fourteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 132, U.N. Doc. A/CONF.62/C.2/SR.1-46 (Turkey); *id.* at 141 (India). See Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 14-15 (1975).

120. Second Committee, Twelfth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 126, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975).

121. *Id.* at 128.

122. See, e.g., Second Committee, Thirteenth Meeting, Summary Record, 2 UNCLOS III

The third position, which represented the views of a few developing States and Spain, was to support a regime which differentiated between warships and merchant ships. For the latter, they accepted freedom of passage; for the former, either innocent passage or a regime that would allow the coastal State to require advance notification or authorization for passage. Although not stated in all cases, these States apparently would have given aircraft (both commercial and military) the same status as warships. Further, submarines would be required to operate on the surface. The support of this group was scattered among the Oman, Algeria, and Fiji proposals.<sup>123</sup>

At the close of the Second Session of the Second Committee in 1974, draft articles had not been agreed upon. The Committee Chairman, however, was able to declare:

No decision on substantive issues has been taken at this session, nor has a single article of the future convention been adopted, but the States represented here know perfectly well which are at this time the positions that enjoy support and which are the ones that have not managed to make any headway.<sup>124</sup>

After stating that the "idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles" was "the keystone of the compromise solution favoured by the majority of the States," the Chairman added that acceptance of this idea was "dependent on the satisfactory solution of other issues, especially [inter alia] the issue of passage through straits used for international navigation."<sup>125</sup> The support enjoyed by the U.K. "transit passage" proposal suggested that it might form the basis for a satisfactory solution of that issue.<sup>126</sup>

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Off. Rec. 130, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of the representative of Canada); Second Committee, Fourteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 140, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (Iraq).

123. See, e.g., Second Committee, Thirteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 130, 133, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of the representative of the People's Republic of China); Second Committee, Fourteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 135, 137, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of the representative of Spain).

124. Statement by the Chairman of the Second Committee at its 46th Meeting, 3 UNCLOS III Off. Rec. 243, U.N. Doc. A/CONF.62/C.2/L.86 (1975).

125. *Id.*

126. See Stevenson & Oxman, *supra* note 119, at 14-15.

#### D. *Preparation of the Informal Negotiating Texts*

After the Second Session, the work of the Second Committee was conducted principally in informal meetings, informal consultative groups, and working groups. The progress of the negotiations, thus, is not reflected in the summary records of the formal meetings of the Committee, of which there were very few.<sup>127</sup> Instead, the work can be followed in informal negotiating texts, in the statements and reports of the Committee, Working Group, and Negotiating Group chairmen,<sup>128</sup> and in the writings of members and observers of the Conference.<sup>129</sup> For the purpose of this article, the most important documentation is the series of informal negotiating texts.<sup>130</sup> The first of these texts, the Informal Single Negotiating Text (SNT), was prepared at the end of the third session.<sup>131</sup>

With respect to the articles on straits, the text of the SNT was worked out by an informal group co-chaired by Fiji and the United Kingdom.<sup>132</sup> Inclusion of the sponsors of two of the most supported proposals on that issue as co-chairmen ensured that the texts they prepared would be generally acceptable to most segments of the Conference. Since successive versions<sup>133</sup> of the informal text have

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127. The Second Committee, for example, held two formal meetings at the third session, one in the fourth, none in the fifth, two in the sixth, five in the seventh, and five in the eighth. See Indexes to summary records of meetings, 4 UNCLOS III Off. Rec. iv (1975); 5 UNCLOS III Off. Rec. iv (1976); 6 UNCLOS III Off. Rec. iv (1977); 7 UNCLOS III Off. Rec. iii (1978); 9 UNCLOS III Off. Rec. v. (1980). Information on the eighth session was provided by the Secretariat of the Conference, since the official records of that session had not been published when this article was prepared.

128. These reports are found in the official records of the Conference, sometimes as separate Conference documents, sometimes as statements to the main committees, and sometimes in reports to the Plenary or General Committee.

129. The most helpful of these comments is the series of reports in the *American Journal of International Law*, starting in 1974, in which John R. Stevenson and Bernard H. Oxman (and in the later versions Mr. Oxman alone) summarize the results of each session of the Conference. The most recent, which gives a reference to all prior articles in footnote 1, is Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session* (1979), 74 AM. J. INT'L L. 1 (1980).

130. The informal negotiating texts were the result of a decision of the Conference on April 18, 1975, adopting a proposal of the president of the Conference, that each committee chairman should prepare an informal single negotiating text, taking account of all the formal and informal discussions held. These texts were to be a procedural device and provide a basis for negotiation. Fifty-sixth Plenary Meeting, Summary Record, 4 UNCLOS III Off. Rec. 26, U.N. Doc. A/CONF.62/SR.52-56 (1975).

131. 4 UNCLOS III Off. Rec. 137-81, U.N. Doc. A/CONF.62/WP.8 (1975).

132. Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763, 764 (1975).

133. The Revised Single Negotiating Text (RSNT) was prepared by the chairmen of the



not resulted in major revisions of the articles but have consisted only of drafting changes and minor fine-tuning, the initial effort appears to have been successful.

The various versions of the informal text, including the Draft Convention, ostensibly are intended to serve only as a basis for negotiations. Conference officials have denied that the informal texts are anything but procedural devices.<sup>134</sup> Three factors require that spokesmen take this position. The first is the method of work of the Conference, which is to proceed on the principle of consensus.<sup>135</sup> The second is that many delegations regard any particular provision acceptable only if it is part of a larger package embracing related elements.<sup>136</sup> Third, not all parts of the informal texts have reached the same state of maturity.<sup>137</sup>

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main committees during the fourth session of the Conference held in New York in March-May 1976, and was published at the close of that session. RSNT, 5 UNCLOS III Off. Rec. 175-85, U.N. Doc. A/CONF.62/WP.8/Rev.1 (1976). For the development of the successive ICNT's, see note 4 *supra*.

134. The president of the Conference has stated:

This composite negotiating text would be informal in character and will have the same status as the informal single negotiating texts and the revised single negotiating texts, which means that it would serve purely as a procedural device and only provide a basis for negotiation without affecting the right of any delegation to suggest revisions in the search for a consensus.

The composite informal negotiating text will certainly not have the character and status of the text which was prepared by the International Law Commission and presented to the Geneva Conference of 1958. It would not have the status of a basic proposal that would stand unless rejected by the requisite majority.

President's proposals regarding the preparation of the informal composite negotiating text, 7 UNCLOS III Off. Rec. 52, 53, U.N. Doc. A/CONF.62/L.20 (1978).

135. The "gentlemen's agreement" establishing that the Conference should proceed on the basis of consensus as far as possible was adopted by the Conference in its rules of procedure. Eighteenth Plenary Meeting, Summary Record, 1 UNCLOS III Off. Rec. 52, U.N. Doc. A/CONF.62/SR.1-51 (1975). For a discussion of the consensus rule, see Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?*, 69 AM. J. INT'L L. 119 (1975).

136. See Stevenson & Oxman, *supra* note 132, at 763, 765.

137. Some of the articles are virtual copies of the Territorial Sea Convention provisions. See, e.g., Draft Convention, *supra* note 4, arts. 2-14 (pt. II, Territorial Sea and Contiguous Zone); arts. 86-120 (pt. VII, High Seas). Others may represent a codification of customary international law as it has developed since 1958. See, e.g., Draft Convention, *supra* note 4, arts. 3 (12-mile sea) & 63 (coastal State exercise of jurisdiction over fisheries beyond the territorial sea). Cf. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. INT'L L. 247, 266 (1977) (suggesting that RSNT provisions will be absorbed into customary international law). Many other articles remain fluid and change between versions. The deep seabed articles fall into this category. See *Law of the Sea Conference: Problems and Progress*, 77 DEP'T STATE BULL. 389, 390 (1977) (statement of U.S. Ambassador at Large Elliot L. Richardson at the close of the Sixth Session) [hereinafter cited as Richardson statement].

The straits articles and the related articles on innocent passage and archipelagos clearly fall within the category that may be considered mature. They are the product of intense negotiations. They have appeared in successive negotiating texts without substantial change. Despite an effort by a small minority to amend the transit-passage articles,<sup>138</sup> no amendments have received substantial support.<sup>139</sup> In the reports of the chairmen of the main committees and negotiating groups for the sessions subsequent to the promulgation of the ICNT, the subject of straits barely has been mentioned.<sup>140</sup> Assuming agreement on as yet unresolved issues in other areas of the Conference agenda, negotiation on the straits issue may be considered to be complete. Subject to minor changes of wording that may occur in the Drafting Committee, it is reasonable to assume that the straits articles of the Draft Convention will emerge intact as provisions of any treaty adopted by the Conference. These articles thus may be considered to have sufficient finality to be assessed for the purpose of determining whether they meet the initial goals of the United States in undertaking the negotiations. This article first reviews the content of the straits articles and then analyzes how that content compares with stated U.S. goals.

### III. THE STRAITS ARTICLES AS CONTAINED IN THE DRAFT CONVENTION<sup>141</sup>

Part III of the Draft Convention contains the articles dealing with straits used for international navigation. The first of its three sections, consisting of articles 34-36, is titled "General" and contains definitions and limitations on the scope and coverage of the straits articles. The second section, consisting of articles 37-44, establishes and describes the regime of transit passage which is the heart of part III. The final section consists of a single article (45)

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138. Richardson statement, *supra* note 137, at 390. The efforts were principally by Spain and Greece in 1976 and 1978. See Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea: A Review of the Record*, 74 AM. J. INT'L L. 77, 100-01, 108 (1980).

139. Introductory Note to Part II of the RSNT, para. 7, 5 UNCLOS III Off. Rec. 153, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II (1976); see Oxman, *supra* note 3, at 6; Richardson statement, *supra* note 137, at 389.

140. See, e.g., Reports of the Committees and Negotiating Groups on negotiations at the seventh session, 10 UNCLOS III Off. Rec. 13, U.N. Doc. A/CONF.62/RCNG/1 (1978); Reports of the Committees and Negotiating Groups on Negotiations at the resumed seventh session, 10 UNCLOS III Off. Rec. 126, U.N. Doc. A/CONF.62/RCNG/2 (1978).

141. For the text of part III of the Draft Convention, see the appendix hereto.

which provides for the regime of nonsuspendable innocent passage through straits exempted from the regime of transit passage.

A. *Section 1: General Provisions*

Except for article 36 and the third subparagraph of article 35, section 1 contributes little to the substantive content of part III. Article 34, paragraph 1, and the first two subparagraphs of article 35, merely reaffirm the obvious—that the juridical status of waters within straits, whether internal water, territorial sea, contiguous zone, economic zone, or high seas, is not affected by the imposition of a servitude of use by other States upon them. Nevertheless, the presence of these articles does help to persuade reluctant States to accept a broader regime than innocent passage. Just as the U.K. proposal's introduction of a new term—transit passage—removed some of the excess baggage that accompanied the U.S. free-transit proposal,<sup>142</sup> the provisions of article 34 and the first two subparagraphs of article 35, making explicit the continuing sovereignty or jurisdiction of the coastal State over areas otherwise subject to its authority, remove an additional psychological barrier to coastal-State acceptance of this part. This reaffirmation of coastal-State authority is directed particularly to the retention of jurisdiction over resources. It is balanced appropriately by the second paragraph of article 34, which sets forth limits on the coastal State's exercise of that authority.

Subparagraph (c) of article 35 contains the standard saving provision, exempting straits already covered by long-standing international conventions from the coverage of the new convention. Such a provision was included in all proposals for a new straits regime.

Article 36 contains an important limitation on the applicability of the straits regime. It exempts from the entire regime of part III (presumably including the innocent-passage provision of article 45) the territorial-sea portion of an international strait used for international navigation if a high-seas or exclusive-economic zone route "of similar convenience with respect to navigational and hydrographical characteristics"<sup>143</sup> exists through the strait. Essentially, this article provides that if there is a ribbon of high seas or exclusive economic zone through a strait, and if navigation within that ribbon is as convenient with respect to navigational and

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142. See note 99 *supra*.

143. Draft Convention, *supra* note 4, art. 36.

hydrographical characteristics as it is through the territorial-sea portions of the strait, then the ship or aircraft must not navigate through the territorial sea but must remain in the high-seas or exclusive economic-zone portion. This provision is a descendant of the original U.K. proposal. However, in the U.K. proposal the limitation was applicable only to transit passage—the exercise of the right of innocent passage through territorial waters was not affected.<sup>144</sup> In the Draft Convention the wording and placement of the article suggest that its provisions are also applicable to parts of straits where the right of innocent passage now exists. Whether this result was intended is not disclosed in the official records of the Conference, since the Chairman's statement accompanying part II of the SNT, in which the provision first appeared in this form, does not explain article 36.<sup>145</sup>

If this interpretation is correct, the provision is unnecessarily restrictive. Depending on the interpretation of the phrase "similar convenience," ships and aircraft might be required to extend their voyages in order to navigate in the middle of wide straits, or to operate out of visual contact with coastal navigation aids. If the forgoing interpretation was not intended, then some clarification from the Drafting Committee is needed.

## B. *Section 2: Transit Passage*

Articles 37 through 43 of the Draft Convention establish the regime of transit passage. Section 2 of part III provides for the coverage of the transit passage regime (article 37), the rights and duties of ships and aircraft exercising the right of transit passage (articles 38-40), the rights of States bordering straits (articles 41, 42, and 44), and the common duties of user States and States bordering straits (article 43).

### 1. *Coverage of the Transit Passage Regime*

Article 37 provides: "This section [transit passage] applies to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone."<sup>146</sup> The defini-

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144. U.K. proposal, *supra* note 96, ch. III, art. 1(4)(a).

145. Introduction to the SNT, 4 UNCLOS III Off. Rec. 153, U.N. Doc. A/CONF.62/WP.8/Part II (1975).

146. Draft Convention, *supra* note 4, art. 37.

tion as contained in the original U.K. transit-passage proposal<sup>147</sup> has been broadened to include the concept of an exclusive economic zone which evolved during the Conference. Although a discussion of that concept is beyond the scope of this article, a brief comment is necessary to place the modification in context.<sup>148</sup>

By the end of the Caracas session in 1974, it was all but formally agreed that any draft treaty would include a 200-mile exclusive economic zone.<sup>149</sup> There were two principal competing concepts of its legal nature. In one, the rights of the coastal State were primary, subject only to the rights of other States to carry out certain limited activities within the zone, including, as a minimum, freedom of navigation and overflight, and freedom to lay cables and pipelines. In the other, the economic zone was an area of the high seas subject to the exercise of certain coastal-State rights, including sovereign rights to the living and non-living resources of the area and the necessary ancillary exclusive jurisdiction to protect those rights.<sup>150</sup>

The ultimate compromise reflected in the informal negotiating texts is an exclusive economic zone that is *sui generis* and has its own distinct legal characteristics which are delineated carefully in the texts.<sup>151</sup> Article 55 of the Draft Convention describes the exclusive economic zone as an "area beyond and adjacent to the territorial sea, subject to the specific regime established in this Part."<sup>152</sup> Article 86 defines the high seas as all parts of the sea that "are not included in the *exclusive economic zone*, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."<sup>153</sup> A transit-passage provision that did not provide passage between an economic zone and other economic zones or the high seas would have been seriously deficient. Many impor-

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147. U.K. proposal, *supra* note 96, ch. III, art. 1.

148. The best discussions of this evolving concept of the exclusive economic zone are found in three articles in the Stevenson-Oxman series: Stevenson & Oxman, *supra* note 132, at 774-81; Oxman, *supra* note 137, at 259-68; Oxman, *supra* note 12, at 67-80.

149. Statement by the Chairman of the Second Committee at its 46th Meeting, 3 UNCLOS III Off. Rec. 242, 243, U.N. Doc. A/CONF.62/C.2/L.86 (1975).

150. Compare Stevenson & Oxman, *supra* note 132, at 777-78 with Introductory Note to the RSNT, Paras. 14-19, 5 UNCLOS III Off. Rec. 153, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II (1976) (statement of the Chairman of the Second Committee) [hereinafter cited as Introductory Note to the RSNT].

151. Introductory Note to the RSNT, *supra* note 150, para. 17. See Oxman, *supra* note 64, at 259.

152. Draft Convention, *supra* note 4, art. 55.

153. *Id.* art. 86.

tant ocean areas, such as the Mediterranean Sea, the Sea of Japan, the South China Sea, and the Caribbean Sea, are entirely the exclusive economic zones of the surrounding coastal States. The Draft Convention thus takes account of this development.

The other significant aspect of the description of straits to which the right of transit passage applies is the omission of straits joining a part of the high seas or an exclusive economic zone to a State's territorial sea. These straits were covered by the original U.S. proposal in the Seabed Committee, although U.S. spokesmen never emphasized it in their explanations of that proposal.<sup>154</sup> Such coverage was not a part of the original U.K. transit-passage plan.<sup>155</sup> This omission at first might appear to be a step backward from the 1958 formulation, but further analysis of the entire text of the Draft Convention indicates that the interests of international navigation in fact may be advanced. This is a result, first, of major improvements (from the point of view of maritime interests) in the innocent-passage provisions and, second, the incorporation of straits leading to the territorial sea of a foreign State within the nonsuspendable innocent-passage provision of article 45.

The principal improvement in the innocent passage regime is the specification of objective standards for the determination of whether passage is innocent.<sup>156</sup> One of the principal U.S. objections to the Territorial Sea Convention was the possibility that coastal States might deny innocent passage based on factors such as the flag, cargo, or destination of the vessel.<sup>157</sup> The Draft Convention has eliminated this possibility. Although article 19 retains the criterion "prejudicial to the peace, good order or security of the coastal State"<sup>158</sup> as a test for innocence of passage, it defines that criterion with a finite listing of *activities*.<sup>159</sup> Thus, innocence of passage is not determined by the purpose or destination of the voyage but by the conduct of the vessel during its passage through the territorial sea. Additionally, in setting forth the duties of coastal States, article 24(1) provides, in part, that "the coastal State shall not: . . . (b) Discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on

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154. See notes 50-53 *supra* & accompanying text.

155. U.K. proposal, *supra* note 96, ch. III, art. 1.

156. Draft Convention, *supra* note 4, art. 19.

157. See text at notes 7-8 *supra*.

158. Draft Convention, *supra* note 4, art. 19(1).

159. *Id.* art. 19(2).

the behalf of any State."<sup>160</sup>

This change does not eliminate the requirement that submarines operate on the surface,<sup>161</sup> nor does it provide overflight rights for aircraft.<sup>162</sup> However, when considered with the second improvement—making innocent passage through such straits nonsuspendable—the benefits of the compromise on the coverage of transit passage clearly outweigh the drawbacks. The exemption of a small category of relatively unimportant straits paves the way for acceptance of the overall regime of transit passage for more numerous and important straits. It makes the entire scheme more widely acceptable, especially to the Arab nations that refused to become parties to the Territorial Sea Convention because of their perception that the straits article unduly favored Israel.<sup>163</sup> On balance, the adoption of a treaty that can obtain wide acceptability on the basic straits issues will do more to promote freedom of navigation than would intransigence on this single point.

An additional category of straits is exempted from the transit passage regime's coverage by paragraph 1 of article 38. That paragraph excludes straits formed by an island and the mainland of the same State and for which "a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island"<sup>164</sup> (hereinafter referred to as "island-mainland" straits). This provision is derived from the original U.K. proposal.<sup>165</sup> While nothing in the Conference records suggests the rationale for this particular provision, a coastal State naturally would view such island-mainland straits differently from those which provide the only means of navigation between ocean areas. Assuming a fair interpretation by coastal States as to whether alternative passages outside the island are in fact of "similar" convenience, their exclusion from the regime of transit passage appears to be only a minor reduction in the scope of coverage of that regime.

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160. Draft Convention, *supra* note 4, art. 24(1).

161. *Id.* art. 20.

162. *See* note 10 *supra*.

163. *See* notes 52-53 *supra* & accompanying text. The Camp David accords provide that, at least as between Israel and Egypt, the Strait of Tiran and Gulf of Aqaba "are international waterways to be open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight." Framework for the Conclusion of a Peace Treaty between Egypt and Israel, Egypt-Israel, Sept. 17, 1978, *reprinted in* 17 INT'L LEGAL MATERIALS 1470 (1978).

164. Draft Convention, *supra* note 4, art. 38.

165. U.K. proposal, *supra* note 96, ch. III, art. 1.

2. *Rights and Duties of Ships and Aircraft Exercising the Right of Transit Passage*

Articles 38 through 40 establish the rights and correlative duties of ships and aircraft under the transit passage regime. Article 38 sets forth the substantive content of the right of transit passage. It is derived with only minor modifications from article 1 of chapter III of the U.K. proposal. The changes made in the successive informal negotiating texts have been principally ones of form.

Article 39 sets forth the duties of ships and aircraft exercising the right of transit passage. It provides for duties common to both ships and aircraft and for duties peculiar to each. This article also is based on the U.K. draft.<sup>166</sup> The only substantive change made during the successive iterations of the informal texts was the addition of the word "sovereignty" in the phrase requiring that ships and aircraft shall "[r]efrain from any threat or use of force against the *sovereignty*, territorial integrity or political independence"<sup>167</sup> of bordering States.

Article 40 prohibits ships, including marine-research and hydrographic-survey ships, from carrying out any research or survey activities during transit passage without the prior permission of bordering States. This provision was inserted in the ICNT to correct an apparent oversight in the texts of the earlier versions.<sup>168</sup> It

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166. U.K. proposal, *supra* note 96, ch. III, art. 1.

167. RSNT, *supra* note 133, ch. II, art. 38(1)(b) (emphasis added).

168. Although the U.K. proposal did not include marine scientific research as one of the activities that a transiting ship must forgo while in passage, it was included in the Oman proposal, *supra* note 114, arts. 3(1)(j), 6(2)(f), 8(1)(b); the Second Fiji proposal, *supra* note 116, art. 5(1)(g); and, as to warships, the Eastern bloc proposal, *supra* note 117, art. 1(2)(a). It is easy to see how this provision fell through the cracks in the SNT and RSNT. The provisions as to straits in the "trends" paper prepared at the end of the Caracas session conformed to the list of subjects and issues and consequently were divided into two parts—"innocent passage" and "other related matters including the question of the right of transit." Appendix I to Statement of the Activities of the Conference during its first and second sessions, Part III, 3 UNCLOS III Off. Rec. 107, 115, 116, U.N. Doc. A/CONF.62/C.2/L.8/Rev.1 (1975). In addition, the Chairman's note accompanying part III of the trends paper stated that "[f]or some delegations, straits used for international navigation which are a part of the territorial sea of one or more States, fall . . . under the same legal regime as that of any other portion of the territorial sea." *Id.* at 115. For this reason, in consolidating the dominant trend into the transit-passage provisions of the SNT, the *rapporteur* was required to borrow from several different parts of the trends paper. Information provided to the author by a member of the U.S. delegation indicates that this inadvertent omission was discovered by the *rapporteur* of the Second Committee while preparing the ICNT. Since the provisions of article 42 were already firmly set, it was decided to insert article 40 as a separate article to avoid reopening the text of article 42. As the proposed addition on marine scien-



seems obvious that if a coastal State is given the right to regulate marine research in its exclusive economic zone,<sup>169</sup> then at least an equivalent right should be included for parts of its territorial sea which form part of an international strait. Further, conducting marine research or hydrographic surveys is not a normal incident of mere passage through a strait.

These three articles, which set forth the rights and duties of ships and aircraft in transit passage, are so closely interrelated to articles 41, 42, and 44, which establish the rights and duties of bordering coastal States, that further analysis of the former is deferred until the later articles are discussed.

### 3. *Rights and Duties of States Bordering Straits*

If there is one principle upon which all States interested in the straits issue were united, it was that coastal States, singly or in cooperation, should have authority to designate sea lanes and prescribe traffic-separation schemes for straits. It was included in the initial U.S. proposal,<sup>170</sup> and all significant subsequent proposals have embraced some form of this idea.<sup>171</sup> The current Draft Convention provision contained in article 41 is derived from the U.K. proposal.<sup>172</sup> Coastal States must indicate clearly on published charts the sea lanes and traffic-separation schemes they have adopted, and once prescribed, ships in transit must respect them. As a prerequisite to making changes to sea lanes or schemes in existence, coastal States must have referred the proposals to "the competent international organization with a view to their adoption."<sup>173</sup> The international organization may adopt only those schemes to which the coastal State has agreed, and the coastal

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tific research was noncontroversial, it was inserted by the *rapporteur* after informal consultations with interested delegations, including the United States. For symmetry's sake, it would appear to have been more in accord with the layout of this part of the ICNT to include marine scientific research in the list in article 42(1) of activities as to which the coastal State may make laws and regulations.

169. See Draft Convention, *supra* note 4, arts. 246-55.

170. U.S. 1971 Draft Articles, *supra* note 26, art. II.

171. See, e.g., Sea-Bed Committee proposals: USSR, *supra* note 74, at 162; Straits-States proposal, *supra* note 81, art. 6; Fiji proposal, *supra* note 104, art. 6(6)-(9). See also Conference proposals: U.K. proposal, *supra* note 96, ch. III, art. 3; Eastern bloc proposal, *supra* note 117, art. 1(1); Oman proposal, *supra* note 114, art. 7; second Fiji proposal, *supra* note 116, art. 5(6)-(10).

172. U.K. proposal, *supra* note 96, ch. III, art. 3.

173. Draft Convention, *supra* note 4, art. 41.

State may prescribe them only after obtaining the concurrence of the international organization. Although not stated in the article itself, it has been assumed that the "competent international organization" is IMCO.<sup>174</sup>

Article 42 provides, in essence, that coastal States may make nondiscriminatory laws and regulations governing safety of navigation, prevention and control of pollution, and regulation of fishing. In addition, coastal States may enforce their laws relating to customs, immigration, sanitation, and fiscal affairs. Transiting ships are required to comply, and ships with sovereign immunity which violate such laws and regulations subject their flag State to international responsibility for any resulting loss or damage.

Article 44 places three important duties on States bordering straits: They shall not hamper transit, they shall give appropriate publicity to any danger to navigation or overflight, and they shall not suspend transit passage. The article is derived without modification from the U.K. proposal<sup>175</sup> and was not modified as it passed through successive versions of the informal negotiating texts.

#### *4. Common Duties of User States and States Bordering Straits*

Article 43 places on user States and States bordering straits the duty of cooperating in the establishment and maintenance of navigation and safety aids within straits and in the control of pollution from ships. This article also is derived from the U.K. proposal,<sup>176</sup> and has remained unchanged except for minor drafting differences in each version of the informal negotiating texts. Although it seems obvious that this article was included in the text to make it more attractive to States bordering straits, there is no explanation of it from its originator nor, to the knowledge of this author, was it ever discussed during the negotiations. The article appears to be a response to the perception of some States bordering straits that they bear economic burdens without receiving a corresponding economic benefit, because most ships transiting "their" straits are bound for ports in other countries. The adoption of article 43 would allow them to share a portion of their burden with user States. While this idea seems acceptable in principle, it is surpris-

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174. See U.K. introductory statement, *supra* note 98, at 102.

175. U.K. proposal, *supra* note 96, ch. III, art. 6.

176. *Id.* ch. III, art. 5.

ing that such a major shift in the respective obligations of coastal and user States should receive apparent approval without any explanation or discussion by the delegations.

With respect to pollution, a user vessel, and in some cases the flag state of the user vessel, has obligations under other articles of the Draft Convention to control pollution in straits and in other parts of the oceans.<sup>177</sup> A user who causes harm to a coastal State also may be liable under generally applicable rules of liability for maritime torts.<sup>178</sup> Article 43(b), however, appears to spread among all user States the burden of controlling pollution, as well as the cost of compensating the coastal State. This could require user States to share in the many burdens now borne by the coastal State alone, or by the user who actually causes the harm, including expense of maintaining an inspection and monitoring service, pollution control research, and clean-up costs in the event of an oil spill. Likewise, paragraph (a) of the article seems to contemplate that coastal States will be able to pass on to user States a share of the cost of establishing and maintaining navigation aids, a cost traditionally borne by coastal States alone.<sup>179</sup>

One problem with the article is that it provides no criteria for determining how such sharing shall be worked out, other than the vague precept that user and coastal States "should by agreement cooperate."<sup>180</sup> Nor does the article provide any mechanism for the coastal State to obtain the cooperation of user States. Presumably any negotiations would have to be multilateral, since there will be many user States for most straits, and whatever cooperation is agreed to by one user State has an impact on the obligation of all other user States. In view of the involvement of IMCO in so many related matters, that organization would appear to be a prime candidate to undertake the coordinating function that will be required to bring about some fair, logical, and coherent system of agreements between coastal and user States.

### C. *Section 3: Innocent Passage*

As noted earlier, straits which connect the high seas or an exclu-

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177. See, e.g., Draft Convention, *supra* note 4, arts. 21, 42, 54, 56, & part XII.

178. See, e.g., 2 I. HALL, A. SANN, & S. BEUMAN, *BENEDICT ON ADMIRALTY* § 4 (1975) (discussing the U.S. Admiralty Jurisdiction Act (Extension), 46 U.S.C. § 740 (1976)).

179. Except in those international waterways through which passage is conditioned upon the payment of tolls.

180. Draft Convention, *supra* note 4, art. 43.

sive economic zone with the territorial sea of a foreign State were omitted from the coverage of the transit passage regime. Likewise, island-mainland straits were excluded if a high-seas or exclusive-economic-zone route of similar convenience existed.<sup>181</sup> Article 45 fills the gap in coverage for these two types of straits by providing that the regime of nonsuspendable innocent passage will apply. Like most of the previous articles, this article also is derived from the U.K. proposal.<sup>182</sup> The regime of innocent passage, with its flat prohibition of suspension of innocent passage, is a major improvement over the current doctrine.<sup>183</sup> Thus, although users of these categories of straits will not have the freedom of passage guaranteed in the regime of transit passage, the rights they will have are a considerable improvement over the current regime for such straits.

#### IV. THE STRAITS ARTICLES AND U.S. GOALS

An analysis of the initial U.S. free-transit proposal and of the comments by U.S. spokesmen about it and subsequently introduced proposals, suggested six basic principles which would be key to any straits provision acceptable to the United States.<sup>184</sup> Having examined the history and detailed the substance of the Draft Convention provisions on transit passage, we may now examine whether they meet those stated U.S. requirements. This analysis will be primarily textual, since the informal negotiating procedure adopted by the Conference after the Caracas session produced little in the nature of formal negotiating history.<sup>185</sup> Such a critical textual analysis seems especially appropriate at this stage of the Conference's proceedings, since ambiguities or uncertainties of meaning revealed now may be corrected by further negotiation. If they are not, at least the text will be accepted with full knowledge

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181. See note 164 *supra* & accompanying text.

182. U.K. proposal, *supra* note 96, ch. III, art. 8.

183. See text at notes 156-63 *supra*.

184. See text at p. 812 *supra*.

185. Although it could be argued that the Vienna Convention on the Law of Treaties, opened for signature May 22, 1969, arts. 31-32, U.N. Doc. A/CONF.39/27, reprinted in 8 INT'L LEGAL MATERIALS 679 (1969) [hereinafter cited as Vienna Convention], requires a primarily textual approach to interpretation, this is not strictly true. Article 31 of the Vienna Convention looks to a textual approach but recognizes that the "object and purpose" of the agreement as well as the "context" play an important role. Further, article 32 authorizes recourse to the *travaux* either to confirm a meaning resulting from the application of article 31 or to determine a meaning which is otherwise ambiguous or obscure or leads to a manifestly absurd result.

of the ambiguities and the possibility of future disagreement as to its meaning.

A. *Unimpeded Passage*

The basic provision of the Draft Convention that protects the right of ships and aircraft to uninterrupted and unimpeded passage is article 38:

1. In straits [used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone], all ships and aircraft enjoy the right of transit passage, which shall not be impeded . . . .
2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.<sup>186</sup>

The Draft Convention is explicit that transit passage "shall not be impeded." By its terms, therefore, it provides the basic guarantee desired by the United States to protect freedom of navigation through international straits. Although there is no explicit provision that the coastal State may not "interrupt" passage, a normal construction of the word "impede" would suggest that any action that would interrupt passage would also impede it. Further, the definition of transit passage in paragraph 2 of article 38 includes the requirement that such passage be "continuous." Although this requirement was included for the benefit of the coastal State, it could be argued that it implies an obligation of the coastal State to permit the transiting ship or aircraft to make a continuous, uninterrupted voyage or flight.

A second safeguard against impeding the passage of vessels and aircraft is contained in article 44, which deals with the duties of States bordering straits. That article provides, *inter alia*, that "States bordering straits shall not hamper transit passage."<sup>187</sup> Since the word "hamper" in this article is synonymous with the word "interfere" in article 38, one might conclude that this provi-

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186. Draft Convention, *supra* note 4, art. 38.

187. *Id.* art. 44.

sion of article 44 is redundant. Its inclusion in article 44, however, does serve a valid and worthwhile purpose. Article 38 is basically definitional and descriptive. Although it grants rights and imposes obligations, it is not absolutely clear from its text alone that the obligations imposed are on the coastal States bordering straits. Article 44 makes explicit that it is an affirmative obligation of States bordering straits not to hamper transit passage.

Realistically, it is not likely that impediments to free transit would be imposed by a flat prohibition of passage. Rather, States would act as they have in connection with innocent passage through the territorial sea—by using the power to regulate to make a passage burdensome or impossible.

#### B. *Nondiscrimination*

Three Draft Convention provisions ensure nondiscrimination against ships and aircraft based on destination, flag, type of vessel, or cargo. First is the use of the phrase “all ships and aircraft”<sup>188</sup> in article 38(1) to describe what ships and aircraft shall enjoy the right of transit passage. Second is paragraph 3 of article 38, which subjects activities that are not an exercise of the right of transit passage to other applicable provisions of the convention. Third is the explicit provision in article 42(2) that any laws and regulations promulgated by coastal States “shall not discriminate in form or in fact amongst foreign ships.”<sup>189</sup>

The use of the adjective “all” in the article 38(1) description of those ships and aircraft entitled to the right of transit passage would seem to be so inclusive as to embrace ships and aircraft of any type (merchant or warship), nationality, destination, or cargo. However, even such an inclusive word as “all” must be construed in a reasonable manner and in the context of the agreement as a whole. For example, “all” ships presumably would not include pirate ships, slave ships, or ships not sailing under the flag of any State. If the word “all” is less than completely inclusive, then one must look at the second and third provisions mentioned to determine a reasonable interpretation of “all.”

The second such provision, article 38(3), provides that “[a]ny activity [of a ship or aircraft while in transit passage] which is not an exercise of the right of transit passage through a strait remains

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188. Draft Convention, *supra* note 4, art. 38(1) (emphasis added).

189. Draft Convention, *supra* note 4, art. 42(2).

subject to the other applicable provisions" of the articles. The thrust of this provision is to make clear that if a ship or aircraft in transit passage engaged in activities other than those permitted,<sup>190</sup> it can no longer hold itself immune from the exercise by the coastal State of the jurisdiction that would otherwise be appropriate if the ship or aircraft were not in transit passage. By making the "activity" of the ship or aircraft the criterion for removing the protection afforded a ship in transit passage, the provision assures that other criteria cannot be used. Thus, this provision, which was included in the text principally for the benefit of coastal States, indirectly reinforces the rights of ships and aircraft exercising the right of transit passage by ensuring that only their activities—not their nationality, type of ship, cargo, or destination—will be the criterion by which their entitlement to transit passage is determined.

The third textual safeguard is the explicit provision in article 42(2) that coastal-State laws and regulations may not discriminate in form or in fact "amongst foreign ships."<sup>191</sup> Article 42(2) ensures that the principle of nondiscrimination among foreign ships must be respected in all coastal-State regulations for transit passage.

Regarding the important U.S. requirement that any law of the sea treaty must not exclude warships from entitlement to transit passage, it could be argued correctly that there is no provision explicitly including warships within the transit passage regime.<sup>192</sup> This observation, however, is misleading. The descriptive words used, "all ships" and "foreign ships," are sufficiently inclusive to cover warships. When they are examined in context, and in light of the object and purpose of the treaty, it is clear beyond question that warships are included. The object and purpose of the transit passage part of the Draft Convention has been obvious since its formal introduction at the Caracas session. At that session, one position on the straits issue was an approach which favored two separate regimes for straits, a regime of free passage for merchant ships and a regime of either innocent passage or prior notification for warships.<sup>193</sup> When the committee chairman incorporated the principal positions into the informal negotiating texts, this bifurcated

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190. Article 39(1) describes those acts which are permitted as incident to transit passage.

191. Draft Convention, *supra* note 4, art. 42(2).

192. It would not be correct if one took account of the reference to submarines in article 20.

193. See text at note 123 *supra*.

regime was abandoned. Nevertheless, a small number of States—primarily those bordering straits—continued to urge that the present formulation of the straits articles did not adequately balance the interests of the straits States against those of the user States.<sup>194</sup> Their efforts culminated in an unsuccessful attempt to change the articles of the ICNT.<sup>195</sup> Even those who have opposed the ICNT recognize that the articles as currently formulated are intended to confer on warships the same right of transit passage that exists for merchant ships. That, in essence, was what the debate was about. Thus, although this history may forbode something less than unanimous adherence to the treaty, or reservations to it if such reservations are permitted, it unmistakably points to the interpretation that “all” ships includes warships as well as merchant ships.

Article 42 applies by its terms only to ships, not to aircraft. This omission should not be construed as a gap in protection of aircraft in transit passage, for nowhere in the transit passage section of the ICNT is there a grant of authority to coastal States to promulgate regulations governing the passage of aircraft. The only duties of aircraft are those specified in the articles themselves<sup>196</sup> or those

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194. Report by the Chairman of the Second Committee on the Work of the Committee in its Fifth Session, 6 UNCLOS III Off. Rec. 135, 138, U.N. Doc. A/CONF.62/L.17 (1977).

195. See Richardson statement, *supra* note 137, at 390. Ambassador Richardson stated, “We successfully retained the generally satisfactory previous texts on passage of straits which a determined minority sought to change.” Although this statement is somewhat cryptic, the reference is principally to efforts by Spain and Greece to reintroduce their ideas. See Moore, *supra* note 138, at 100-01, 108.

At the resumed ninth session in Geneva, some delegations continued to oppose innocent passage for warships. Break-through Reported in Sea-Bed Negotiations: Informal Text of Draft Convention Produced 20-21, U.N. Doc. SEA/422 (Press Release, Sept. 2, 1980). Along with other delegations at the ninth session, the United States

made it clear that there is no possibility of a Convention on the Law of the Sea with such provisions added, and that pressing these points will result either in the destruction of the Convention or in a “negative record” that makes it obvious that the proper interpretation of the Convention is the opposite of what the proponents seek.

United States Delegation Report, Resumed Ninth Session of the Third United Nations Conference on the Law of the Sea, Geneva, July 28-Aug. 29, 1980, at v (typescript on file with the *Virginia Journal of International Law*).

196. These include proceeding without delay over the strait, refraining from the threat or use of force or other violations of international law as embodied in the charter of the United Nations, refraining from activities other than those incident to passage in the normal mode, observing the rules of the air established by ICAO, monitoring the appropriate international air traffic control radio frequency, and complying with the other provisions of part III. Draft Convention, *supra* note 4, art. 39.



flowing from the appropriate international rule-making body (ICAO). There is no duty of aircraft, paralleling that of ships, to comply with the laws or regulations of a coastal State. Thus, what the Draft Convention accomplishes by explicit provision as to ships, it accomplishes by silence as to aircraft. Although for symmetry's sake one might have wished the two provisions to be parallel, there is no reason to expect that one method will prove to be more effective than the other.

### C. *Overflight by Aircraft*

Perhaps the most important drawback to the concept of "innocent passage" as a basis for protecting freedom of navigation through straits is that it does not include the right of overflight by aircraft. Any increase in the breadth of the territorial sea removes a corresponding belt of airspace previously available for air navigation. If the increase is so great as to cause territorial seas to meet, air navigation without the consent of the coastal State is precluded. A study conducted by the Department of State disclosed that an increase in the breadth of the territorial sea from three to twelve miles would "close" more than 100 straits used for international navigation.<sup>197</sup> While some of these straits are insignificant, and others are under the control of the United States or friendly governments, the list contains sixteen categorized as "major." These include such strategically important straits as Gibraltar, Dover, Bab el Mandeb, and Hormuz. Anything short of a guaranteed right of passage for aircraft would pose serious problems for air navigation, particularly in times of international tension when consent, routinely granted in normal times, might be withheld.<sup>198</sup>

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197. U.S. Dep't of State, Office of the Geographer, "World Straits Affected by a 12 Mile Territorial Sea" (Chart #510376 1971) (on file with the author). See Osgood, *supra* note 2, at 12.

198. During the 1973 Arab-Israeli war, U.S. aircraft flying to Israel on resupply missions were forced to fly through the Straits of Gibraltar rather than overfly the territory of allied States that were unwilling to grant overflight rights in time of crisis. Gelb, *U.S. Jets for Israel Took Route Around Some Allies*, N.Y. Times, Oct. 25, 1973, § 1, at 1, col. 2. See also Grandison & Meyer, *supra* note 7, at 414 n.73.

Professor Osgood has argued that in day-to-day dealings, States are more likely to grant passage rights that they would not grant as a matter of law in a multilateral treaty. In essence, he says, "[B]y asking for less in law [the United States] may get more protection for its interests in fact." Osgood, *supra* note 2, at 35. I would argue that just the opposite is true. If a State has discretion either to grant or delay passage of a second State, it is more vulnerable to pressure from a third State not to grant the privilege than if that privilege has been accepted as a legal right. Osgood seems to acknowledge this in his statement that in

Thus, freedom of overflight for aircraft was the sine qua non of the U.S. straits position.

Article 38 of the Draft Convention assures that overflight of international straits by aircraft is treated identically with navigation through such straits by surface ships. Paragraph 1, which is the granting clause, has a dual subject, "ships and aircraft." They are equal in their entitlement to and enjoyment of the right of transit passage. Paragraph 2, which describes and limits the extent of the right, likewise couples "navigation and overflight" without distinction. No other article detracts from the equality of navigation and overflight as granted in article 38.

Article 41, which prohibits States bordering straits from hampering transit passage, also requires these States to give appropriate publicity to dangers to both "navigation or overflight within or over the strait."<sup>199</sup> Article 39, which prescribes the duties of ships and aircraft in transit passage, lists a series of duties common to ships and aircraft and separate duties peculiar to each. There is no implication in text or context, however, that suggests that the separately stated duties of aircraft diminish in any way the rights of aircraft. Rather, the duties of aircraft (*i.e.*, to comply with ICAO rules and to monitor the internationally designated air traffic control radio frequency) are those normally expected of aircraft flying in restricted airspace, just as those stated for ships (*i.e.*, to comply with the international rules of the road and internationally accepted pollution-control norms) are those normally expected of ships.

The most significant difference between the treatment of ships and aircraft in this section of the Draft Convention is the inclusion of additional authority for coastal States to regulate ships in transit<sup>200</sup> and the imposition of additional duties on ships to refrain from certain activities while in transit<sup>201</sup> and to respect<sup>202</sup> or comply with coastal-State laws and regulations.<sup>203</sup> There is no im-

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the 1973 Middle East crisis the refusal of all allied States except Portugal to grant overflight rights "greatly enhanc[ed] the need to fly over the strait of Gibraltar." *Id.* at 19 n.23. Osgood also suggests that major powers have chosen to ignore legal niceties when their vital interests are threatened. *Id.* at 29-30. The answer to this argument is that such choices are accompanied by substantial political costs.

199. Draft Convention, *supra* note 4, art. 41.

200. *Id.* arts. 41 and 42.

201. *Id.* art. 40.

202. *Id.* art. 41(7).

203. *Id.* art. 42(4).

plication from these differing textual provisions that either the right of navigation or the right of overflight is superior to the other. The differences result from differences in the history and practice of surface and aerial navigation. It is clear that the drafters intended to place overflight of straits used for international navigation on the same legal plane as surface navigation. They have accomplished this in a way that leaves little room for interpretation otherwise, and affords ample protection to the interests of international air navigation and commerce.

#### D. *Submerged Passage by Submarines*

Another significant limitation on international navigation through straits, although currently affecting only naval forces, is the requirement that submarines exercising the right of innocent passage navigate on the surface and show their flag.<sup>204</sup> Such a requirement not only destroys any military advantage that a submarine enjoys by undetected passage through straits, but also may impose additional hazards.<sup>205</sup> For these reasons, the right of submarines to pass through straits submerged was a significant element of the U.S. negotiating position.

Unlike most aspects of the transit-passage provisions of the Draft Convention already examined, there is no explicit textual provision recognizing the right of submerged transit for submarines. The closest thing to an explicit recognition appears in article 39(1)(c): Ships in transit shall "[r]efrain from any activities other than those incident to their *normal mode* of continuous and expeditious passage."<sup>206</sup> "Normal mode" of transit apparently contemplates vehicles of different characteristics, each of which would be limited in its passage to those activities normal to its particular mode of navigation. Whatever is normal to the mode of passage for the particular vehicle—surface ship, aircraft, or submarine—is permitted. Whatever is not a normal incident of continuous and expe-

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204. Territorial Sea Convention, *supra* note 5, art. 14(6).

205. See, e.g., Second Committee, Thirteenth Meeting, Summary Record, 2 UNCLOS III Off. Rec. 130, 135, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1975) (statement of Ambassador Stevenson). The hazard of collision while operating on the surface is posed by the low profile of a submarine on the surface, which not only makes it difficult for the submarine to be seen by other shipping but also makes it difficult for a submarine to see and avoid other ships in the straits. In the submerged mode, however, the submarine is in its natural element and can more easily detect and avoid other shipping.

206. Draft Convention, *supra* note 4, art. 39(1)(c) (emphasis added).

ditious transit is not permitted. In the case of submarines, submerged navigation is normal.

Another more potent argument for the inclusion of submerged passage within the right of transit passage involves a comparison of the provisions of the transit-passage part of the Draft Convention (part III) with those articles governing the right of innocent passage through the territorial sea (part II, section 3). The latter explicitly requires that submarines exercising the right of innocent passage must operate on the surface. It suggests that omission of such a provision from part III is not the result of mere inadvertence. The Conference focused on the problem of submerged passage and distinguished the rights of submarines under the two regimes. It required operation on the surface for innocent passage through those parts of the territorial sea not parts of straits governed by the regime of transit passage, and permitted (by not requiring otherwise) submerged passage under the regime of transit passage.

A comparison to the high-seas part of the Draft Convention (part VII) reinforces the same conclusion. It never has been contended that the "freedom of navigation" confirmed by article 87 of the Draft Convention does not include the right of submerged navigation for submarines. Yet there is no provision in part VII which explicitly confers that right on submarines. It is this "freedom of navigation" for the purpose of transit which is carried over by article 38(2) into the regime governing straits. The requirement of that article—that such freedom of navigation shall be exercised "in accordance with this Part"—clearly implies that, subject only to the restrictions contained in part III, the freedom of navigation conferred by article 38 is coextensive with freedom of navigation on the high seas. Any other construction would do violence to the plain meaning of the text.

Nevertheless, several U.S. international law scholars have argued that the right of submerged passage is not sufficiently secure in the current transit passage articles.<sup>207</sup> The arguments of two of these

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207. These arguments were made in response to a letter, dated July 26, 1976, from Senator Barry Goldwater to a number of international lawyers asking for their opinions as to the interpretations of several provisions of the informal negotiating texts. See Moore, *supra* note 138, at 92 n.27. Professor Moore has summarized the portions of those replies dealing with the issue of submerged transit. According to Professor Moore,

Professors Richard B. Bilder, William T. Burke, Louis Henkin, Brunson MacChesney, Ved P. Nanda, and Stefan A. Riesenfeld interpreted the text as

scholars<sup>208</sup>—Professors H. Gary Knight and W. Michael Reisman—were answered by Professor William T. Burke in 1977.<sup>209</sup> Pointing out that the Knight and Reisman arguments were based almost exclusively on “textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context,”<sup>210</sup> and on “mostly hypothetical excursions into possible references of the term ‘normal mode of transit,’ undertaken largely without reference to the negotiations and the purposes sought,”<sup>211</sup> Professor Burke persuasively refutes the contentions of both scholars. He points out that the term “transit passage” was understood by all delegations—those that favored it and those that opposed it—to include submerged transit for submarines. After all, that was what the negotiation was about. The two basic elements which the proponents of free transit or transit passage sought to include in the treaty which were not already included in the concept of innocent passage were the rights of overflight and submerged passage. To eliminate either of these two key elements from the concept of transit passage would reduce the articles to virtual meaninglessness.

Although it might be argued that Professor Burke’s analytical method goes beyond the interpretive canons of the Vienna Convention on the Law of Treaties (Vienna Convention),<sup>212</sup> those methods appear to be sound. The text itself plainly points to the inclusion of submerged passage within the regime of transit passage. Under article 32 of the Vienna Convention, recourse may be had to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclu-

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clearly including a right of submerged transit. In contrast, Professors Gary Knight, Jerome C. Muys, Michael Reisman, and Alfred Rubin did not assert that the text prohibited submerged transit but merely that it did not unambiguously include it. The responses of Professors Richard Falk, Edward Gordon, and Woodfin L. Butte do not as easily fit into either category.

*Id.*

208. These commentators noted that there is no explicit mention of a right of submerged passage in the RSNT, and contended that the RSNT neither establishes a secure right nor insulates transit passage from coastal States’ discretionary powers to qualify passage as “nontransit” and therefore subject to exclusion. See Burke, *Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 199-200 (1977).

209. Burke, *supra* note 208, at 200-20.

210. *Id.* at 202.

211. *Id.* at 213.

212. Vienna Convention, *supra* note 185, arts. 31 & 32.

sion, in order to confirm the meaning resulting from the application of article 31."<sup>213</sup> Professor Burke's excursions into the *travaux* and other supplementary material do no more than confirm the meaning already derived from textual and contextual analysis.

Professor Reisman has elaborated his theme in a recent article.<sup>214</sup> He argues that despite the reasonableness of inferring a right of submerged passage from the absence of its prohibition (particularly since the innocent-passage section contains such a prohibition), the opposite inference is also possible—particularly because such a right would be a derogation from sovereignty.<sup>215</sup> By raising such an inference, Professor Reisman has, at most, created an ambiguity—the resolution of which depends on the supplementary means of interpretation under article 32 of the Vienna Convention. These, as Professor Burke has argued so convincingly, clearly establish the existence of a right of submerged passage.<sup>216</sup> Thus, although Professor Reisman's argument has some superficial plausibility, this analysis points irrefutably to the conclusion that the right of transit passage includes the right of submerged passage for submarines.

Finally, the initial U.S. proposal,<sup>217</sup> which was so obviously designed to obtain the right of submerged passage, had no explicit provision granting it. Rather, it relied on the tie between the commonly understood meaning of "freedom of navigation" on the high seas and the use of that term in its proposal. Article 38(2) adopts the same technique of defining transit passage in terms of "freedom of navigation" as that term is used in the high-seas part of the text. The argument that somewhere along the line the right of submerged navigation of submarines dropped out of that "freedom" cannot be sustained.

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213. *Id.* art. 32.

214. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48 (1980).

215. *Id.* at 71.

216. Professor Reisman's theme now has drawn another response. Professor John Norton Moore makes a strong independent case from both textual and contextual analysis that the right of submerged passage is included in the right of transit passage. Moore, *supra* note 138, at 95-102. Moore argues that no participant "[had] any doubt that the text fully provides a right of submerged transit through covered straits and archipelagic sea lanes." *Id.* at 102.

217. See U.S. 1971 Draft Articles, *supra* note 26, art. II.

### E. *Types of Straits Covered*

As originally drafted by the U.S. delegation to the Seabed Committee, the U.S. free-transit proposal applied to all straits used for international navigation and joining two parts of the high seas, or joining the high seas with the territorial sea of a foreign State.<sup>218</sup> The U.S. interest in free transit through straits leading only to the territorial sea of a third State apparently was not as rigid as that for straits joining two parts of the high seas.<sup>219</sup> The U.K. transit-passage proposal did not include such straits in the category entitled to transit-passage rights, but relegated them to the regime of nonsuspendable innocent passage.<sup>220</sup> When the United States gave its unequivocal support to this proposal,<sup>221</sup> it was stating that, for all intents and purposes, the U.K. regime would satisfy fundamental U.S. goals for that category of straits.

In order for a strait to qualify for the right of transit passage under the Draft Convention articles it must meet two affirmative criteria: First, it must be used for international navigation, and second, it must connect an area of the high seas or an exclusive economic zone with another area of the high seas or an exclusive economic zone.<sup>222</sup> The strait also must meet a negative criterion: It must *not* be formed by an island and the mainland of the same State if there is a high seas route or an economic-zone route of similar convenience seaward of the island.<sup>223</sup>

The first affirmative criterion is consistent with the position on the right of free transit taken by the United States at the outset of the negotiation process. The second affirmative criterion, by eliminating straits which lead to the territorial sea of a foreign State, might have some detrimental effect on U.S. interests in a few areas of the oceans. However, the gains from compromising on this position outweigh the minor impact of its loss.<sup>224</sup> The two affirmative criteria should be acceptable in their present form to the United States and other maritime States.

The elimination of island-mainland straits also would not appear to pose any significant problems. First, no such straits are strategi-

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218. *Id.*

219. See notes 50-53, 154-63 *supra* & accompanying text.

220. See text at note 101 *supra*.

221. See text at note 121 *supra*.

222. Draft Convention, *supra* note 4, art. 37.

223. *Id.* art. 38(1). See text at notes 164-65 *supra*.

224. See text at notes 50-53, 154-63 *supra*.

cally critical.<sup>225</sup> Second, the qualification that there must be a high-seas or exclusive-economic-zone route of similar convenience seaward of the island<sup>226</sup> ensures that if the high-seas or exclusive-economic-zone route poses serious inconvenience, the island-mainland passage will remain subject to the regime of transit passage. Third, the right of nonsuspendable innocent passage will exist through such island-mainland straits.<sup>227</sup>

Submarines passing through island-mainland straits would be required to operate on the surface. If, however, the high-seas or exclusive-economic-zone route were of similar convenience, submarines desiring to remain unobserved could choose that route. Aircraft would be barred completely from island-mainland straits, since they are not entitled to exercise the right of innocent passage. Nonetheless, they probably would be the least inconvenienced by this provision, since their high speed renders detours less inconvenient than for ships or submarines. If the detour were a significant one, then the criterion of an alternative route of "similar convenience" would not be met, and the aircraft would be allowed to use the island-mainland strait.

Overall, the categories of straits subject to the regime of transit passage established by articles 37 and 38, and the elimination of island-mainland straits from that regime, does not pose significant restraints on the freedom of surface, subsurface, or air navigation so long as island-mainland straits remain subject to the regime of nonsuspendable innocent passage.

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225. The author knows of no definitive study which has been done on such straits, but his own informal review suggests that there are no critical passages which fit this criterion. The coasts of the world are filled with examples of such island-mainland straits, many of which may be the source of future disputes as to the interpretation of the criterion of whether a high-seas or exclusive-economic-zone route "of similar convenience" exists. It seems obvious that such a major strait as Messina (between Sicily and mainland Italy) would not be removed from the regime of transit passage by application of this criterion. However, is Peloponnesus, by virtue of its size, considered to be part of mainland Greece or an island? If mainland, is the passage between it and Kithira within the exception for island-mainland straits? Is the passage between Peloponnesus and mainland Greece within the exception? The question becomes even more complex when the criterion is applied to island States such as Indonesia, the Philippines, or the Bahamas. In these cases, which are mainland islands and which are island islands? Fortunately for the navigator, the status of most important navigational straits seems clear.

226. Draft Convention, *supra* note 4, art. 38(1).

227. *Id.* art. 45.



*F. Regulation of Ships and Aircraft in Passage*

Because the power to regulate can be used to infringe the right of transit, it is important that powers of regulation granted to coastal States be limited to those that will protect legitimate rights of those States and be set forth with specificity. The right of coastal States to regulate with respect to straits is limited by article 41 to designating or substituting sea lanes, and prescribing traffic-separation schemes. Article 42 empowers coastal States to prevent, reduce, and control pollution; prohibit fishing; and regulate the taking on board or putting overboard of commodities, currency, or persons in contravention of customs, fiscal, immigration, or sanitary regulations.

Although the articles are quite narrow, they grant bordering States sufficient latitude, particularly regarding pollution-control regulations, to interfere significantly with transiting ships. The safeguard drafted to prevent such interference is the requirement that bordering-State regulations be consistent with international standards. Article 41 allows States bordering straits to prescribe or substitute sea lanes or traffic separation schemes only after they have received the approval of the "competent international organization."<sup>228</sup> Article 42 also restricts the regulatory power of the coastal State by allowing it to give effect only "to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait."<sup>229</sup> This precaution is reinforced further by article 233, which provides that nothing in the rules and regulations, enforcement, or safeguards sections of the marine environment part "shall affect the legal regime of straits used for international navigation."<sup>230</sup>

It is only in the cases of fishing, customs, fiscal, immigration, and sanitary regulations that the discretion of the coastal State is not limited by an international standard. Such regulations are limited, however, by paragraph 3 of article 42 which requires that laws and regulations not discriminate among foreign ships or "in their application have the practical effect of denying, hampering, or im-

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228. The "competent international organization" contemplated by the proposing State (the U.K.) was IMCO. See text at notes 172-74 *supra*. No other organization was suggested by any other delegation as a substitute.

229. Draft Convention, *supra* note 4, art. 42.

230. *Id.* art. 233.

pairing the right of transit passage."<sup>231</sup>

In the absence of consent by the coastal State, fishing never has been a permitted activity for a foreign vessel within the territorial sea. A prohibition of such fishing, therefore, would be reasonable. Although the power to enforce fishing regulations conceivably could be abused, the overwhelming coastal-State interest in this use of the sea predominates. Customs, fiscal, immigration, and sanitary regulations are limited by the narrowness of article 42(1)(d). The only regulation permitted by paragraph (1)(d) is control of the "taking on board or putting overboard of any commodity, currency or person."<sup>232</sup> Thus, it is not any general violation of coastal-State regulations in these areas that will suffice to trigger intervention, but the specific act of taking on board or putting overboard designated persons or things. Except for acts which would violate sanitary regulations (*e.g.*, dumping garbage or pumping bilges), these acts would not be incidents of normal passage through a strait, and they are subject to observation and proof by objective evidence. Therefore, the danger of abuse by the coastal State appears small.

## V. CONCLUSION

The negotiating history of the straits articles reflects the tension that traditionally has existed between the interests of strait-bordering States desirous of protecting their legitimate interests against real or perceived threats posed by transiting foreign ships, and the legitimate interests of States whose vessels use those straits as essential routes of navigation and commerce. The Territorial Sea Convention, at least as it has been interpreted in practice, unduly emphasized the rights of bordering States at the expense of the interests of user States.

Straits are not just another part of the territorial sea. On most voyages ships can avoid navigating through the territorial sea of a foreign State with little inconvenience. Straits, however, are the indispensable gateways of international sea routes. Some destinations (*e.g.*, to any point in the Mediterranean Sea from the North Atlantic) cannot be reached without traversing a strait. In other cases (*e.g.*, transit from the Pacific to the Indian Ocean), traversing a strait results in a saving of thousands of miles. Straits are unique

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231. *Id.* art. 42(3).

232. *Id.* art. 42(1)(d).

and deserve unique treatment. The Draft Convention provides such treatment, and strikes an appropriate balance between the rights of coastal States and the rights of States whose vessels and aircraft use those straits. If the consensus reflected in the Draft Convention holds together through the remaining negotiation process and results in a treaty acceptable to most States, UNCLOS III will have accomplished a major improvement in freedom of international navigation.

The present straits articles also represent a significant achievement by the U.S. delegation to the Conference. Despite predictions that the U.S. position on straits never would be accepted,<sup>233</sup> the United States persisted in a patient process of negotiation and obtained the essential rights it sought. This achievement was not accomplished by dogmatic adherence to its initial proposal, but by a willingness to accept proposals put forth by others if they met essential U.S. concerns. The U.K. delegation deserves major credit for synthesizing a straits proposal from the various negotiating positions. The straits provisions of the Draft Convention protect the essential interests of the United States and other major maritime States. The adoption of a comprehensive law of the sea treaty including part III of the Draft Convention offers the best hope for incorporating a stable and just straits regime into the international legal order.

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233. See STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., 1ST SESS., *THE LAW OF THE SEA CRISIS* 10 (Committee Print 1971). See also Knight, *supra* note 2, at 781-82; Osgood, *supra* note 2, at 34.

## APPENDIX

**Draft Convention on the Law of the Sea  
(Informal Text)**

U.N. Doc. A/CONF.62/WP.10/Rev.3

## PART III. STRAITS USED FOR INTERNATIONAL NAVIGATION

*Section 1. General*

## Article 34

Juridical status of waters forming straits  
used for international navigation

1. The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

## Article 35

## Scope of this Part

Nothing in this Part shall affect:

(a) Any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;

(b) The status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or

(c) The legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

## Article 36

High seas routes or routes through exclusive economic  
zones through straits used for international navigation

This Part does not apply to a strait used for international navigation if a high seas route or a route through an exclusive economic

zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait.

## *Section 2. Transit Passage*

### Article 37

#### Scope of this section

This section applies to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

### Article 38

#### Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

### Article 39

#### Duties of ships and aircraft during their passage

1. Ships and aircraft, while exercising the right of transit passage, shall:

- (a) Proceed without delay through or over the strait;
- (b) Refrain from any threat or use of force against the sover-

eignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) Comply with other relevant provisions of this Part.

2. Ships in transit shall:

(a) Comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

(b) Comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

3. Aircraft in transit shall:

(a) Observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;

(b) At all times monitor the radio frequency assigned by the appropriate internationally designated air traffic control authority or the appropriate international distress radio frequency.

#### Article 40

##### Research and survey activities

During their passage through straits, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

#### Article 41

##### Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giv-

ing due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes are proposed through the waters of two or more States bordering the strait, the States concerned shall co-operate in formulating proposals in consultation with the organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

#### Article 42

##### Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may make laws and regulations relating to transit passage through straits, in respect of all or any of the following:

(a) The safety of navigation and the regulation of marine traffic, as provided in article 41;

(b) The prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) With respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) The taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact amongst foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit

passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

#### Article 43

##### Navigation and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement co-operate:

(a) In the establishment and maintenance in a strait of necessary navigation and safety aids or other improvements in aid of international navigation; and

(b) For the prevention, reduction and control of pollution from ships.

#### Article 44

##### Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

#### *Section 3. Innocent Passage*

#### Article 45

##### Innocent Passage

1. The régime of innocent passage, in accordance with section 3 of Part II, shall apply in straits used for international navigation:

(a) Excluded under article 38, paragraph 1, from the application of the régime of transit passage; or



(b) Between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.



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